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Supreme Court, U.S.
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CAPITAL CASE

No. 10- 101302

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IN THE

Supreme Court of the United States

CARL PUIATTI,
Petitioner,

v.

EDWIN G. BUSS, SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE
QUESTION PRESENTED

Does a joint capital penalty phase implicate a defendant's Eighth and Fourteenth Amendment rights to an individualized sentencing determination; if so, are those rights violated when a trial court fails to sever a joint capital penalty proceeding despite a likelihood of prejudice and confusion, and never clearly instructs the jury to consider the aggravating and mitigating evidence separately as to each defendant, and to return different sentences if the evidence so warrants.

PARTIES TO THE PROCEEDINGS

The parties to the proceeding below are as set forth in the caption of the case.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner Carl Puiatti respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS AND ORDERS BELOW

The opinion of the court of appeals (Pet. App. 1a) is reported at 626 F.3d 1283. The order of the court of appeals denying rehearing en banc (Pet. App. 126a) is unreported. The opinion of the district court (Pet. App. 71a) is reported at 651 F. Supp. 2d 1286.

STATEMENT OF JURISDICTION

The opinion of the court of appeals was entered on November 29, 2010. The court of appeals denied a timely petition for rehearing en banc on January 21, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

1. a. Petitioner Carl Puiatti and his co-defendant, Robert Glock, were indicted in October 1983 for kidnapping, robbing, and murdering Sharilyn Ritchie in Pasco County, Florida. Before trial, Puiatti moved to sever his case from Glock's, citing material differences between confessions he and Glock made while in custody, and arguing that a joint trial would prejudice not only the jury's determination of guilt but also its decision to recommend a life or death sentence. (A-2/203-05).[1] The severance motion was denied. After a two-day trial in which neither defen-

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[1] References to the record ("A-," followed by volume and page number) are designated according to the index filed with the district court. See No. 8:92-cv-539-T-EAK (M.D. Fla.) Docket No. 97

dant presented any witnesses, the jury convicted both of all charges.

b. Citing both the special concerns of a capital sentencing proceeding and the increased risk of antagonism between the codefendants, Puiatti renewed his motion to sever the sentencing proceeding after the guilty verdicts were rendered. (A-9/2191-92). Puiatti's counsel argued that the court had "seen a flavor in the trial of the possible result in a joint trial, namely, that Mr. Puiatti may face another accuser besides the State in being tried, and I think this problem becomes even more important in the penalty phase." (A-9/2191). The trial court denied the motion.

One of Puiatti's mitigation theories was that he acted under the substantial domination of Glock. *See* Fla. Stat. § 921.141(6)(e). He introduced testimony from a forensic psychologist, Dr. Donald DelBeato, who testified that Puiatti suffered from brain dysfunction (A-10/2238-39), was "easily influenced" (A-10/2244), "very easily manipulated" (A-10/2249), and that the offense was not something Puiatti would have done if he were alone (A-10/2251). The jury also heard from psychiatrist Dr. Richard Meadows, who testified that Puiatti suffered from "several mental illnesses" (A-10/2409), had right-side brain damage that caused him "poor judgment" and "poor impulse control" (A-10/2412), functioned at the emotional level of a 10- or 11-year-old (A-10/2424), and suffered from "avoidance personality," making him "suggestible or influenced easily by other people." (A-10/2410-11). Dr. Meadows testified that "it is in [Puiatti's] nature to be easily influenced" and that at the time of the crime, "he was being leaned on rather heavily by" Glock. (A-10/2425). Dr. Meadows concluded by agreeing that Puiatti had been acting

under the substantial domination of Glock at the time of the offense. (A-10/2425).

The principal attack on Puiatti's mitigation case came not from the State, but from Glock, who cross-examined Puiatti's witnesses—in fact, only Glock's counsel cross-examined Dr. Meadows—and advanced an antagonistic mitigation theory. Glock contended that he, not Puiatti, was the one who was easily influenced. Accordingly, Glock called clinical psychologist, Dr. Gerald Mussenden, who testified that it was *Glock* who was "easily influenced" and "could certainly be exploited." (A-10/2329). Dr. Mussenden testified that Glock was neither hostile nor antisocial (A-10/2337) and "would not normally have done" something like this if "he had not had this . . . really bad, destructive association" with Puiatti. (A-10/2392). In direct contradiction to Puiatti's mitigation theory, both Glock's mother and sister testified that Glock was a "follower." (A-10/2323; A-10/2356).

Glock also took the stand to testify on his own behalf. Immediately before his testimony, Puiatti's counsel objected. Unlike Glock, Puiatti could not have testified because, had he done so, he would have been impeached with two prior convictions. Renewing the motion to sever, Puiatti's counsel argued:

> [Glock's testimony] places Mr. Puiatti in a position, namely, that no instruction is going to cure. This is an inescapable impression in front of the jury that [Puiatti's] avoiding something by not testifying, that he's not willing to face up to it. The instruction is not going to compensate. He's really stuck. Your Honor knows that if I put him on the stand he's going to be impeached on two prior convictions. If I don't put him on the stand, how can I compensate for this? This is placing

> me in an inescapable position. I would renew the motion for severance.

(A-10/2358). The court denied the motion and offered no protective or curative instruction. Glock went on to testify that he "feels a lot of remorse" for the crime and that he was "sorry about what happened [and] [i]f there was anything I could do to bring her back, I would do it." (A-10/2359, 2362). Puiatti was never able to make any similar statement to the jury.

At the close of testimony, Puiatti's counsel again renewed her motion to sever, joining Glock's counsel in arguing that it was "clear" he was "not only being pursued by the State, but by his co-defendant." (A-10/2433). The trial court denied the motion, concluding that "[i]f there are no overriding reasons for separating them like [*Bruton v. United States*, 391 U.S. 123 (1968)] testimony or something like that, I really am convinced even more so now than at the time I made the ruling that the denial of the motion to sever was correct." (A-10/2433).

Before closing arguments began, the trial judge framed the decision before the jury in the singular: "[A]s I told you yesterday, you now have the evidence with which you will be expected to decide on *an advisory sentencing verdict*." (A-11/2466) (emphasis added). During his closing arguments to the jury, the prosecutor also repeatedly described Puiatti and Glock as one unit, rather than separate individuals: "these guys are like—two peas in a pod—the old cliché, as alike as two peas in a pod." (A-11/2482). The prosecutor argued that Puiatti and Glock should be treated no differently from each other at sentencing because of their "symbiotic relationships," arguing that neither "one of these [would] have been

likely to do this crime by themselves . . . so . . . there's no reason to treat them any differently." (A-11/2483).

The trial judge then gave his final charge to the jury. The judge never instructed the jury to consider the aggravating and mitigating evidence as to each defendant separately or individually. Nor did he expressly explain that the jury could return different advisory sentences for the two defendants. Rather, he repeatedly referred to returning a *single* sentence, thereby suggesting that the jury should return the same sentences for both Glock and Puiatti:

> It is now your duty to advise the court as to what *punishment* should be imposed on Mr. Glock and Mr. Puiatti. . . .
>
> [Y]our advisory *sentence* should be based . . . .
>
> The *sentence* that you recommend to the Court must be based upon the facts . . . .
>
> [Y]our advisory *sentence* must be based upon these considerations . . . .
>
> [I]t is not necessary that *the* advisory *sentence* of the jury be unanimous. . . .
>
> [Y]ou should bring to bear your best judgment in reaching your advisory *sentence*.

(A-11/2521, 2522, 2524-25) (emphasis added). The judge concluded: "[Y]ou will now retire then to consider your *recommendation*. When seven or more of you are in agreement as to what *sentence* should be recommended to the court, *that form* of recommendation should be signed by your foreman and returned to the Court." (A-11/2528) (emphasis added).

The jury voted to recommend death for both Puiatti and Glock by the same margin: 11-1. The judge entered a single order sentencing both defendants to death. In entering joint findings in support of the sentences, the trial judge, who, not only heard the testimony during both phases of the trial, but also presided over months of pre-trial proceedings and had the benefit of counsel's briefs, confused the two defendants several times. For example, he stated that both defendants came from middle class backgrounds, when in fact Glock was abandoned and institutionalized. (A-2/346). The judge also attributed Puiatti's mental health evidence to Glock. (A-2/348).

2. a. The Florida Supreme Court, which *sua sponte* consolidated Puiatti's direct appeal with Glock's, affirmed Puiatti's conviction and sentence. The court rejected Puiatti's arguments that the joint penalty phase was prejudicial because, *inter alia*, he and Glock presented antagonistic mitigating defenses, and that the joint proceeding violated his constitutional rights. *Puiatti v. State*, 495 So. 2d 128 (Fla. 1986). Puiatti petitioned this court for certiorari. This Court granted the petition, vacated the Florida Supreme Court's decision, and remanded for reconsideration in light of *Cruz v. New York*, 481 U.S. 186 (1987). See *Puiatti v. Florida*, 481 U.S. 1027 (1987). On remand, the Florida Supreme Court reaffirmed Puiatti's conviction and sentence, *Puiatti v. State*, 521 So. 2d 1106 (Fla. 1988), and Puiatti's subsequent petition for certiorari was denied. *Puiatti v. Florida*, 488 U.S. 871 (1988).

b. Puiatti then sought post-conviction relief in state court. Puiatti filed a Florida Rule of Criminal Procedure 3.850 motion, which was denied. Puiatti

appealed that denial and filed an original petition for habeas corpus in the Florida Supreme Court. In a consolidated opinion, the Florida Supreme Court affirmed the denial of the 3.850 motion and denied Puiatti's state habeas petition. *Puiatti v. Dugger*, 589 So. 2d 231 (Fla. 1991). However, two justices stated in a special concurrence that although the court had already denied Puiatti's claim regarding severance, they "would reconsider Puiatti's penalty phase claim that he did not receive the individualized sentencing hearing he is entitled to under the constitution." *Id.* at 236 (Barkett and Kogan, JJ., specially concurring).

3. On April 23, 1992, before the effective date of the Anti-terrorism and Effective Death Penalty Act ("AEDPA"), Puiatti filed a 28 U.S.C. § 2254 petition for habeas corpus in the United States District Court for the Middle District of Florida. Several times over the ensuing years, the district court administratively stayed the proceedings pending the outcome of various other state or federal proceedings.

On August 14, 2009, the district court granted in part and denied in part Puiatti's petition. Pet. App. 71a. The district court denied four of Puiatti's challenges to his conviction, but granted relief as to one of his penalty phase claims. The court held that the joint penalty phase "severely impaired Puiatti's ability to present [mitigating] evidence." Pet. App. 93a. The court found that "[m]any of [Puiatti's] mitigating witnesses were directly contradicted by Glock's witnesses; each of [Puiatti's] witnesses was subject to double cross-examination; Glock's testimony highlighted Puiatti's failure to testify; and the prosecutor used the joint nature of the proceedings to further de-individualize the defendants." Pet. App. 93a. "Together," the court held, "these circumstances

effected a crippling blow to Puiatti's individual identity in the eyes of the judge and jury, and violated his rights under the Eighth and Fourteenth Amendments." Pet. App. 93a. The district court vacated Puiatti's death sentence and ordered a new sentencing hearing. In light of this holding, the district court determined that Puiatti's remaining challenges to his death sentence were moot. Pet. App. 93a-94a.

4. The court of appeals reversed and remanded. Pet. App. 1a.[2] The court held that joining codefendants in the same capital penalty phase raised *no* Eighth Amendment implications "whatsoever," and instead found that joinder is "quite compatible" with individualized sentencing. Pet. App. 63a, 70a. The court held that the joint sentencing proceeding did not violate Puiatti's right to an individualized sentencing determination and was not prejudicial, reversed the district court's grant of relief, and remanded for consideration of Puiatti's remaining challenges to his death sentence. Pet. App. 70a. On January 21, 2011, the court denied Puiatti's petition for rehearing en banc. Pet. App. 126a.

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[2] The court of appeals also denied Puiatti a certificate of appealability to appeal from the denial of his habeas challenges to his conviction. See Pet. App. 43a n.12.

REASONS FOR GRANTING THE PETITION

This case presents the question of whether, and to what extent, a joint capital penalty phase implicates a defendant's "well-established" Eighth and Fourteenth Amendment rights to an individualized sentencing determination For decades, this Court has recognized that a capital defendant is entitled to an "individualized" sentencing decision that is based not only on the circumstances of the offense, but also on the defendant's unique characteristics and background. See, *e.g.*, *Lockett v. Ohio*, 438 U.S. 586 (1978). Among other things, the right to an individualized sentencing determination requires that the jury be able to consider and give meaningful effect to all evidence offered in mitigation that could warrant imposing a sentence less than death.

Although this Court has never squarely considered whether the Eighth and Fourteenth Amendments are implicated when two defendants are joined in the same capital sentencing proceeding, two courts of appeals have held that the tension between joinder and individualized sentencing is "inherent" and present in every case involving multiple capital defendants. See *United States v. Bernard*, 299 F.3d 467 (5th Cir. 2002); *United States v. Tipton*, 90 F.3d 861 (4th Cir. 1996). The Eleventh Circuit below, however, concluded that there were *no* Eighth Amendment implications of joint capital sentencing "*whatsoever*," and that joinder was "quite compatible" with individualized sentencing.

The courts of appeals are thus at odds concerning an exceptionally important issue that this Court has yet to fully consider. Although this Court has discussed joinder and severance of criminal defendants in ordinary criminal proceedings, see, *e.g.*,

Zafiro v. United States, 506 U.S. 534 (1993), it has never directly considered the extent to which the Eighth and Fourteenth Amendments constrain a court's discretion to join defendants in the same *capital sentencing* proceeding, or whether the trial court in a joint proceeding must *clearly* instruct the jury to consider the aggravating and mitigating evidence separately as to each defendant, and to return different sentences if the evidence so warrants.

There are significant reasons why a joint capital penalty phase implicates a defendant's Eighth and Fourteenth Amendment rights, including preserving the jury's ability to impartially consider and give effect to a defendant's individual mitigating evidence. Among other things, a joint proceeding invites the jury to weigh one defendant's mitigating evidence against the other's, and allows one defendant's case in mitigation to be negated by the codefendant's evidence, including evidence that would have been inadmissible in a severed proceeding. A joint proceeding also shifts the jury's attention from the individual background of the defendant to the defendants' common acts in committing the offense. Without clear instructions, the jury is left with the implication arising from the joint guilt/innocence trial that, having convicted both defendants of the same offense, it should impose the same sentence on each. That implication, however, collides head on with *Lockett* and its command that a sentencer must give attention to the defendant's individual background in addition to the circumstances of the offense.

Finally, the decision of the court of appeals that Puiatti's penalty phase proceeding did not violate his right to an individualized sentencing determination

is incorrect. Glock's presence, and the adversarial role of his counsel in the joint trial, effectively negated Puiatti's case in mitigation. Puiatti's mitigation evidence, including testimony that he was acting under the substantial domination of Glock, was directly contradicted, not by the State, but by Glock, who pursued an irreconcilable mitigating theory and presented testimony, some of which could not have been introduced in a severed proceeding. Moreover, the taint of Glock's testimony of remorse—contrasted with Puiatti's silence—essentially introduced another aggravator: the jury was left free to infer that Puiatti shared no such remorse, and it was never told not to hold it against him. There also was a significant likelihood that the jury confused the defendants' mitigating evidence, as even the trial judge could not keep straight which witnesses testified on which defendant's behalf.

The trial judge declined to sever the penalty phase, mistakenly believing that if no severance was required under the Sixth Amendment at guilt/innocence, there was no need to consider severance at penalty. Moreover, rather than attempting to minimize the risk of prejudice from the joint trial with clear instructions, the trial judge's instructions to the jury compounded the problem: He *never* told the jury to individually and separately consider the defendants' mitigation cases, and instead left the jury with the inescapable impression that it was to return a single sentence for both defendants.

The court of appeals repeated these errors: It held that if severance is not required at guilt/innocence, *a fortiori*, no severance is required at penalty; and it sanctioned a flawed jury instruction that only exacerbated the prejudice of the joint proceeding.

I. WHETHER, AND TO WHAT EXTENT, A JOINT CAPITAL PENALTY PHASE IMPLICATES A DEFENDANT'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS TO AN INDIVIDUALIZED SENTENCING DETERMINATION IS A RECURRING ISSUE OF EXCEPTIONAL IMPORTANCE

1. For more than thirty years, this Court has recognized the bedrock principle that treating "each defendant in a capital case with that degree of respect due the uniqueness of the individual" is a "constitutional requirement in imposing the death sentence." *Lockett*, 438 U.S. at 605 (plurality opinion). A core component of this basic principle is that the sentencer must be able to take into account both the circumstances of the offense *and* the unique background of the individual offender: "What is important at the selection stage is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime." *Zant v. Stephens*, 462 U.S. 862, 879 (1982); see also *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) ("[T]he fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."); *Stringer v. Black*, 503 U.S. 222, 230 (1992) (observing the "well-established Eighth Amendment requirement of individualized sentencing determinations in death penalty cases").

Thus, this Court has held that the capital sentencing process cannot restrict the jury's ability to consider and give full meaningful effect to a defendant's individual mitigating evidence. See, *e.g.*, *Abdul-Kabir v. Quaterman*, 550 U.S. 233, 263-64 (2007) ("Our cases following *Lockett* have made clear that when the jury is not permitted to give meaningful effect or a 'reasoned moral response' to a defendant's mitigating evidence—because it is forbidden from doing so by statute or a judicial interpretation of a statute—the sentencing process is fatally flawed.").[3] This Court has also held that the jury is precluded from performing its obligation to render an individualized sentencing determination when it is misled about its role in the sentencing process by, for example, instructions that minimize its sense of responsibility for fixing the sentence. See *Caldwell v. Mississippi*, 472 U.S. 320, 330-31 (1985) (plurality opinion).

2. This Court has not squarely addressed whether, and to what extent, this "well-established" right to an individualized sentencing determination is implicated when two defendants are joined together in the same capital sentencing proceeding. Although this

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[3] See also *Romano v. Oklahoma*, 512 U.S. 1, 7 (1994) ("States must ensure that capital sentencing decisions rest on an individualized inquiry under which the character and record of the individual offender and the circumstances of the particular offense are considered.") (internal citations, alterations and quotation marks omitted), *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002) ("*Eddings* [*v. Oklahoma*, 455 U.S. 104 (1982),] makes clear that it is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and give effect to that evidence in imposing [the] sentence.")

Court has addressed joinder and severance of criminal defendants *generally*, see, *e.g.*, *Zafiro*, 506 U.S. at 534; *Richardson v. Marsh*, 481 U.S. 200 (1987), it has never directly considered the ramifications of joinder and severance at the capital penalty phase, a proceeding that requires individualized consideration as a constitutional imperative.

The goal of a capital sentencing proceeding is not to determine guilt or innocence, but to select, based on a reasoned moral judgment, who from among the class of those eligible for the death penalty are the most deserving of the ultimate punishment. See, *e.g.*, *Zant*, 462 U.S. at 878-79. This life or death determination, this Court has held, demands a heightened degree of reliability as compared to ordinary criminal proceedings. See, *e.g.*, *Lowenfield v. Phelps*, 484 U.S. 231, 238-39 (1988) (citing *Lockett*, 438 U.S. at 604). Accordingly, elevated concerns to protect against prejudice and to ensure fairness to the accused attend the decision to join two defendants in a capital penalty phase relative to other criminal proceedings, including the guilt/innocence phase of a murder trial.

Among such concerns is the degree to which a joint penalty phase disrupts the jury's ability to consider and give effect to each defendant's separate and individual mitigating evidence. For example, a joint proceeding can invite the jury to weigh one defendant's mitigating evidence against the other's,[4] or permit one defendant to introduce mitigating

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[4] See, *e.g.*, *United States v. Green*, 324 F. Supp. 2d 311, 326 (D. Mass. 2004) (Where there are differences in the defendants' mitigating evidence, "virtually every argument for mitigation made by one defendant will be in effect an argument against mitigation as to the other defendant if that defendant cannot claim the same attribute.").

evidence that contradicts or negates the other defendant's evidence; such evidence is particularly problematic where it would have been inadmissible in a severed proceeding.[5] Joint proceedings also increase the likelihood that the jury will be confused as to which aggravating and mitigating evidence is relevant to which defendant, and joint proceedings inherently divert the jury's focus from each individual's background to the common acts of the pair.

Moreover, interests favoring joinder generally apply with far less force at the capital penalty phase. For example, because the proceeding must focus on the individual character and backgrounds of the defendants, the efficiency gains of a joint proceeding are reduced because the government must individualize its case against each defendant separately. As to the interest in avoiding "inconsistent verdicts," see *Richardson*, 481 U.S. at 210, this Court has recognized that two defendants who are equally complicit in the commission of an offense may be entitled to different punishments if individual differences in their circumstances so warrant: "The rule in *Lockett* recognizes that a consistency produced by ignoring individual differences is a false consistency." *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982). Joint trials can divert the jury's attention away from those individual differences by focusing on the shared acts underlying the crime. Finally, there is evidence that the decision to join defendants in a capital

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[5] See, *e.g.*, *Foster v. Commonwealth*, 827 S.W.2d 670, 683 (Ky. 1992) ("The respective evidence in mitigation offered by the appellants to the jury was antagonistic to each other. The penalty phase as to Foster was unfairly tainted by the appearance of Powell's counsel acting as a second prosecutor.")

sentencing trial has substantive effects on the jury's recommendation.[6]

In sum, this case presents the Court with an opportunity to consider whether, and to what extent joint capital penalty proceedings implicate concerns not present in other criminal proceedings, and to determine when severance or other precautions are necessary to protect against undue prejudice.

3. The question presented is recurring and has wide ranging significance. Because of the constitutional sensitivity of joint capital penalty phases, three states allow joint proceedings only in rare circumstances, if at all.[7] In the remainder of the states employing the death penalty, and in the federal system, joint capital proceedings are not uncommon.[8] Courts in these jurisdictions have

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[6] In research cited by the district court, prospective jurors "voted for death 65.1% of the time" when defendants were joined, and only "47.2% of the time when the defendant was tried alone." Pet. App. 93a (citing Edward J. Bronson, *Severance of Co-Defendants in Capital Cases: Some Empirical Evidence*, Cal. St. U., Chico Discussion Paper Series No. 94-1 (1994)).

[7] See, *e.g.*, Ga. Code § 17-8-4(a) ("When two or more defendants are jointly indicted for a capital offense, any defendant so electing shall be separately tried unless the state shall waive the death penalty."); Ohio Rev. Code § 2945.20 ("When two or more persons are jointly indicted for a capital offense, each of such persons shall be tried separately," unless the court specifically orders otherwise.); *Smith v. State*, 724 So. 2d 280, 306 (Miss. 1998) (holding that in capital cases, "if a motion for severance is filed, the trial court has no discretion and instead must grant the requested severance").

[8] There have been at least 70 federal death penalty trials involving multiple defendants. See Motion for Guilt and/or Penalty Proceedings and Deliberations and Verdicts Separate from the Co-Defendant on Retrial, Ex. A at 2, *United States v. Lecco*, No 05-CR-107 (S.D. W Va.), 2009 WL 6669944.

encountered, and will undoubtedly continue to encounter, multiple-defendant capital trials. And, as explained *infra*, they have approached the constitutional issues involved in varying ways. This Court's guidance on whether, and the extent to which the Eighth and Fourteenth Amendments constrain a judge's discretion to join capital defendants in the same sentencing proceeding is therefore warranted.

4. Neither AEDPA nor *Teague v. Lane*, 489 U.S. 288 (1989), bar this Court from considering the question presented. Because Puiatti filed his petition *before* the effective date of AEDPA, the requirement that the relevant state-court adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established" Supreme Court law does not apply. See 28 U.S.C. 2254(d)(1). Both courts below so held. Pet. App. 64a & n.30; Pet. App. 78a. Moreover, the State has waived any reliance on *Teague* by failing to raise a *Teague* objection as to this claim in its response to Puiatti's habeas petition.[9] See, *e.g.*, *Danforth v. Minnesota*,

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Many of these courts have been sensitive to the implications of joint proceedings and have invoked some form of severance, however, a fair number of joint trials have proceeded. Providing guidance on this issue would aid those courts grappling with joint capital trials

[9] The State raised *Teague* in response to the habeas petition as to two of Puiatti's other claims, but did not raise a *Teague* objection to his individualized sentencing claim. The State first raised a *Teague* objection in a Rule 59(e) motion to alter or amend the judgment filed *after* the district court had granted relief "An issue presented for the first time in a motion pursuant to Federal Rule of Civil Procedure 59(e) generally is not timely raised, accordingly, such an issue is not preserved for appellate review" *Holland v. Big River Minerals Corp*, 181 F 3d 597, 605 (4th Cir 1999)

552 U.S. 264, 289 (2008) ("States can waive a *Teague* defense, during the course of litigation, by expressly choosing not to rely on it . . . or by failing to raise it in a timely manner.") (citations omitted).[10]

II. THE COURTS OF APPEALS ARE DIVIDED ON WHETHER JOINT CAPITAL PENALTY PROCEEDINGS ARE IN TENSION WITH THE EIGHTH AMENDMENT

1. Acknowledging the special concerns attending capital proceedings, the majority of the courts of appeals that have considered the question have held that there is "inherent" tension between a joint capital penalty proceeding and the Eighth Amendment right to an individualized sentencing determination. The Fifth Circuit has recognized the "inherent tension between joinder and each defendant's constitutional entitlement to an individualized capital sentencing decision." *Bernard*, 299 F.3d at 475. The Fifth Circuit explained that "[a] trial court must be especially sensitive to the existence of such tension in capital cases, which demand a heightened degree of reliability." *Id.*

Similarly, the Fourth Circuit has held "that trial court discretion as to severance in the capital-penalty phase must be considered so constitutionally constrained at its outer limits" by "the Supreme Court's 'individualized consideration' jurisprudence as embodied in *Gregg v. Georgia*, 428 U.S. 153 (1976) . . . and its progeny." *Tipton*, 90 F.3d at 892. Indeed, the Fourth Circuit recognized that the threat to a capital defendant's right to an individualized

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[10] Puiatti argued in the court of appeals that the State waived reliance on *Teague*, and the court of appeals' decision neither cites nor relies on *Teague*

sentencing determination will be present "in *any* case involving multiple defendants." *Id.* (emphasis added).

Moreover, the Fourth Circuit noted that although some of the same concerns favoring joint trials—such as efficiency and fairness to the Government—are also "at play" at the penalty phase, "more important of course than any consideration of inconvenience or possible unfairness to the Government from sequential separate trials are the possibilities of unfairness to the accused persons from a joint penalty-phase trial—specifically the threat posed to individualized consideration of their situations." *Id.*

Several federal district courts also have recognized the Eighth Amendment implications of joint capital sentencing proceedings. The court in *United States v. Aquart*, No. 3:06cr160 (JBA), 2010 WL 3211074 (D. Conn. Aug. 13, 2010), observed that "under the Eighth Amendment, a capital defendant is entitled to an '*individualized* determination' of his penalty" and held that "even if severance is not required for the liability trial, the individualized determination objective can be largely achieved by holding sequential, separate penalty trials for each defendant." *Id.* at *7; see also *United States v. Lecco*, No. 05-CR-107, 2009 U.S. Dist. LEXIS 79799, at *11-12 (S.D. W. Va. Sept. 3, 2009) ("In assuring that only those most deserving of a capital sentence actually receive it, society benefits from allowing a defendant to make the best case in mitigation possible to a fact finder who has under consideration *that defendant alone*.") (emphasis added).[11]

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[11] See also *United States v. Catalan Roman*, 376 F. Supp. 2d 96, 97 (D.P.R. 2005) (ordering severed, sequential penalty phase

Where severance is not mandated, these courts have recognized that clear jury instructions are required to minimize the potential for de-individualizing the defendants. For example, in *Tipton*, the Fourth Circuit concluded that it was "satisfied that the court's *frequent* instructions on the need to give each defendant's case individualized consideration sufficed to reduce the risk [of de-individualization] to acceptable levels." 90 F.3d at 892 (emphasis added); accord *Bernard*, 299 F.3d at 476 (upholding a joint proceeding where "the court *repeatedly* instructed the jury to consider each defendant's punishment separately") (emphasis added).

Moreover, where district courts have declined to sever joint penalty proceedings, they have recognized that sufficient and repeated jury instructions about the need to treat the defendants individually were necessary to mitigate some of the prejudice of the joint trial. See, *e.g.*, *Taylor*, 293 F. Supp. 2d at 899 ("[T]he Court will take every reasonable opportunity in this case to instruct the jury to consider each defendant separately."); *United States v. Rivera*, 363 F. Supp. 2d 814, 824 (E.D. Va. 2005) ("The Court finds that appropriate jury instructions emphasizing

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hearings "to protect both defendants' 8th amendment right to an individualized sentence"); *Green*, 324 F. Supp. 2d at 326 (joining defendants would raise "Eighth Amendment concerns about individualized treatment at the punishment phase"); *United States v. Taylor*, 293 F. Supp. 2d 884, 891 (N.D. Ind. 2003) ("The Court's discretion with respect to severance is constrained to some degree by the fact that this is a capital case. Because a defendant's life hangs in the balance, Eighth Amendment jurisprudence dictates that a capital case has a heightened need for reliability and requires vigilant protection of each defendant's constitutional right to an individualized sentencing decision.").

the importance of the constitutional rights of a defendant to individualized sentencing will effectively safeguard the defendant's rights to an individualized assessment during the joint penalty phase.").[12]

2. By contrast, the Eleventh Circuit held that a joint capital penalty phase does not have "any Eighth Amendment implications *whatsoever*." Pet. App. 63a (emphasis added). A capital defendant's right to an individualized sentencing determination, the Eleventh Circuit held, is "quite compatible with a joint [penalty phase] trial," and any tension between a joint capital penalty phase and individualized sentencing is, at most, "arguable." Pet. App. 70a.

Unlike the Fourth and Fifth Circuits, the Eleventh Circuit recognized no heightened constitutional concerns attending the joint capital penalty phase, and instead relied entirely on case law and reasoning applicable to joinder and severance of ordinary criminal trials. Pet. App. 51a-54a; 65a-69a (citing *Zafiro* and *Richardson*). Because *Lockett* and its progeny did not involve joinder or severance, the court reasoned, the underlying principle of individualized consideration recognized in those cases has no applicability to joint capital sentencing proceedings Departing from the views of the other courts, the Eleventh Circuit held that the right to an individualized sentencing determination imposes *no* additional constraints on a trial judge's decision to join two defendants in the same sentencing proceeding.

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[12] This Court's decision in *Zafiro*, which did not concern the heightened need for reliability in death penalty cases, notes that appropriate jury instructions "often will suffice to cure any risk of prejudice" in a joint trial 506 U S. at 539

Moreover, relying on *Richardson*, which did not involve a joint penalty phase, the Eleventh Circuit reasoned that joint penalty phase trials "avoided the inequity of inconsistent verdicts and one capital defendant going second with the benefits of previewing the State's evidence and arguments," and agreed that this case is a "classic example of why joint defendants ought to be tired together to get justice." Pet. App. 69a (internal quotation marks and citations omitted). But the Eleventh Circuit did not recognize, as the other circuits have, that although such considerations of efficiency and fairness to the government remain "in play" at penalty, they must yield to heightened concerns regarding individualized sentencing and fairness to the accused.[13] Laboring under the opposing view that the right to individualized sentencing described in *Lockett* and its progeny does not implicate joinder at capital sentencing, the Eleventh Circuit essentially concluded that if there are no reasons to sever a capital case at the outset of the guilt/innocence phase of the trial, then, *a fortiori* there is no need to consider severance at penalty.

Finally, as explained in more detail *infra*, the Eleventh Circuit endorsed the use of a jury charge that never instructed jurors to consider each defendant's mitigating evidence separately and individually. By

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[13] For example, as explained *infra*, at the capital-penalty phase, any purported advantage a defendant would get from going second and "previewing" the State's case is minimal, because the State's penalty phase evidence, to the extent it presents any, should properly be *individualized* as to each defendant. Moreover, here, there was virtually no efficiency to be realized in the joint penalty proceeding because the State introduced no evidence

contrast, the Fourth and Fifth Circuits affirmed joint capital sentencing proceedings in large part because the trial courts "repeatedly" instructed jurors to "give each defendant's case individualized consideration," and took other precautions to protect against the risks of prejudice and confusion that are attendant to joint sentencing proceedings. *Tipton*, 90 F.3d at 892; see also *Bernard*, 299 F.3d at 476. The Eleventh Circuit condoned an instruction that consistently referred to the defendants' sentences and the jury's task in the undifferentiated singular. Indeed, the trial court's concluding instruction told the jury to consider its advisory "sentence" and to return one "form of recommendation" to the Court. These instructions stand in marked contrast to the instructions given in *Tipton* that "reduce[d] the risk [of de-individualization] to acceptable levels." 90 F.3d at 892.

3. There are no procedural hurdles preventing the Court from deciding the question presented and resolving the disagreement among the circuits. As the district court correctly found, Puiatti advanced the factual and legal basis for this claim on direct appeal, arguing that the joint penalty phase was prejudicial, and the Florida Supreme Court decided it on the merits. See Pet. App. 81a; *Puiatti v. State*, 495 So. 2d 128, 131 (Fla. 1986) (stating that Puiatti "claims that the trial court's denial of a severance in the penalty phase prejudiced him").[14]

Puiatti also raised the claim in state collateral proceedings, and again the Florida Supreme Court denied Puiatti's claim on the merits, without relying

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[14] The Eleventh Circuit assumed that Puiatti exhausted this claim and denied it on the merits. See Pet. App. 49a n.15.

on a state procedural rule to bar consideration of his claim. See *Puiatti v. Dugger*, 589 So. 2d 231, 234 (Fla. 1991) (rejecting Puiatti's argument that "the trial court denied Puiatti his right to an individualized sentencing by joining his penalty hearing with that of his codefendant"). Indeed, then-Justice Barkett "acknowledge[d] that the [Florida Supreme] Court ha[d] previously addressed Puiatti's claim concerning severance," and stated that "[h]aving recently refocused on the problems associated with joint *penalty* phases, however, [she] would *reconsider* Puiatti's penalty phase claim that he did not receive the individualized sentencing hearing he is entitled to under the constitution." *Id.* at 236 (Barkett and Kogan, JJ., specially concurring) (second emphasis added). Accordingly, there can be no procedural bar to consideration of this claim: "the last state court to be presented with [the] particular federal claim reach[ed] the merits." *Ylst v. Nunnemaker*, 501 U.S. 797, 801 (1991).

III. THE ELEVENTH CIRCUIT'S DECISION THAT THE JOINT PENALTY PHASE DID NOT DEPRIVE PUIATTI OF HIS RIGHT TO AN INDIVIDUALIZED SENTENCING DETERMINATION IS INCORRECT

As both the Fourth and Fifth Circuits have recognized, a joint capital penalty phase directly implicates a defendant's constitutional right to an individualized sentencing determination. The Eleventh Circuit's decision to the contrary holds that because *Lockett* and its progeny did not involve severance, the Eighth and Fourteenth Amendment rights to an individualized sentencing determination underpinning those cases has *no* application to joint sentencing proceedings whatsoever. Accordingly,

the Eleventh Circuit erroneously concluded, if two defendants were properly joined in the guilt/innocence phase of a trial, nothing constrains a judge's discretion to join them in the same penalty phase, despite the heightened constitutional concerns present when a jury is considering whether to sentence a defendant to death.

As this case illustrates, however, the central teachings of the *Lockett* line of cases—including that the jury must be able to give "meaningful consideration and effect" to the defendant's case in mitigation, *Abdul-Kabir*, 550 U.S. at 246—collide with the risk of prejudice faced by defendants in a joint capital penalty proceeding. The Eleventh Circuit ignored these considerations, relying instead on the interest in "avoiding inconsistent verdicts," and its view that Puiatti and Glock were equally complicit in the commission of the offense and thus should be sentenced together in order to get "justice." This Court's cases are to the contrary: The focus of a penalty phase is on individualized consideration of the defendant's background and character, and different sentences for codefendants are not only permissible, but *required*, where differences in the defendants' circumstances warrant. Finally, the Eleventh Circuit erred in concluding that the jury instructions ensured that Puiatti would get individualized attention. The instructions never expressly told the jury that it could return different sentences for both defendants, and instead left it with the clear impression that it was expected to return the same sentence for each.

1. The joint sentencing proceeding undoubtedly undermined Puiatti's ability to present his individual case in mitigation: Glock's rigorous pursuit of his

mitigating theory effectively negated Puiatti's mitigating evidence; Glock's testimony turned Puiatti's silence into an aggravator before the jury; and the joint proceeding resulted in confusion of the defendants' mitigating evidence.

First, contrary to the Eleventh Circuit's conclusion, Puiatti and his codefendant did present contradictory mitigating theories, as the district court correctly held. Puiatti presented evidence demonstrating that he was acting under the substantial domination of Glock, and that he would not have committed the crime but for Glock's encouragement.[15] (A-10/2425) ("It's in [Puiatti's] nature to be easily influenced" and Puiatti "was being leaned on rather heavily by" Glock.). Glock advanced the directly contradictory theory that he, not Puiatti, was a "follower" (A-10/2313, 2356), and that Glock would not have committed the crime but for the "really bad, destructive association" he had with Puiatti. (A-10/2342).

Glock's pursuit of his mitigation theory thus effectively nullified Puiatti's mitigation case. Glock's counsel cross-examined Puiatti's witnesses and pursued cross-examination on issues ignored by the State—indeed, *only* Glock's counsel cross-examined Puiatti's expert mental health witness who testified that Puiatti was acting under the substantial domination of Glock at the time of the crime. In addition, to counter Puiatti's mitigation evidence, Glock introduced evidence about his own mental condition that would have been *in*admissible in a severed proceeding against Puiatti alone. The mitigating evidence

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[15] Acting "under the substantial domination of another person" is a statutory mitigating factor in Florida. See Fla. Stat. § 921.141(6)(e).

presented by Glock cancelled out Puiatti's mitigating evidence and amplified the State's case against Puiatti. See, *e.g.*, *Catalan-Roman*, 376 F. Supp. 2d at 107-08 (granting penalty-phase severance where one defendant's mitigating evidence would dilute the codefendant's evidence).[16]

The Eleventh Circuit concluded that the codefendants' mitigating strategies were "similar" but not antagonistic. See Pet. App. 65a. But it is their very similarity that made the two theories mutually exclusive: Each blamed the other as the instigator of the crime and each claimed he would not have done it but for the other. In reality, the joint proceeding impelled the jury to weigh Puiatti's mitigating case against his codefendant's, drastically diminishing the jury's ability to give Puiatti's own mitigating evidence the "meaningful effect" required under the Eighth Amendment.

Second, although Puiatti exercised his constitutional right not to testify, Glock took the stand during the penalty phase to testify as to his own remorse for the crime. There can be no question that this testimony was extraordinarily prejudicial to Puiatti, as the jury inevitably contrasted Puiatti's silence with

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[16] In addition, Glock, and not Puiatti, was able to take advantage of the mitigating factor of no prior criminal history. In fact, because Puiatti had waived consideration of that factor, the jury would not have been exposed to it in a severed trial But both Glock's counsel and the prosecutor highlighted that factor—and its absence for Puiatti—in their statements to the jury. The prosecutor urged the jury to compare the two, arguing: "[Y]ou know who has a criminal history and who doesn't." (A-11/2474) By inviting the jury to make such a comparison, the prosecutor turned the absence of a mitigating factor for Puiatti into an aggravating one

his codefendant's display of remorse. Not only would the jury have likely inferred that Puiatti did not share in that remorse, or had something to hide, but it also likely viewed Puiatti's silence as aggravating. *Taylor*, 293 F. Supp. 2d at 899 (finding that one defendant's "remorse expressed during his allocution at sentencing or other cooperation may highlight another defendant's decision to exercise his Fifth Amendment right to remain silent or not to cooperate, and may work to convert that silence or non-cooperation into self-incriminating evidence in the eyes of the jury").[17]

Critically, although counsel warned that such testimony was likely to be highly prejudicial to Puiatti—indeed, she argued that no instruction could cure the prejudice—the state trial judge allowed Glock to testify, and gave *no* cautionary or limiting instruction whatsoever. Cf. *Carter v. Kentucky*, 450 U.S. 288, 305 (1981) (holding that a trial judge must instruct a jury that no adverse inference can be drawn from a defendant's failure to testify). The jury was never told that it should not compare the two defendants' decisions to testify, nor was it told that it should consider Glock's testimony separately and only in consideration of Glock's punishment. Instead, the jury was left free to draw the obvious adverse

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[17] The Eleventh Circuit held that Puiatti was not prejudiced by Glock's testimony because he was able to introduce evidence of his remorse through the testimony of other witnesses. Pet. App. 68a. But the testimony of others, for example, Puiatti's mother, is no substitute; if anything, Puiatti's silence in the face of Glock's display of remorse led the jury to discredit these other witnesses because Puiatti could not take the stand and express his remorse himself.

inference: Glock was sorry for his actions, but Puiatti was not.[18]

Third, it is clear that the joint proceeding introduced extraordinary confusion, preventing jurors from considering each defendant's mitigating evidence separately. The trial judge's sentencing order itself reflects that he could not distinguish between the two defendants, as it repeatedly confused one defendant's mitigating evidence for the other's. For example, the trial judge found that Glock came from a middle class background, when in fact he was abandoned and sent to an orphanage. (A/2-346). The trial judge also confused the two defendants' mental health evidence. (A-2/348).[19] If the trial judge, who lived with the case for months, confused the two

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[18] During the *guilt/innocence* phase, when neither defendant testified, the jury was instructed not to hold their decisions to remain silent against them or to view the defendants' silence "as an admission of guilt" (A-2/262) But the jury was not told to apply this or any similar requirement at the *penalty* phase, when guilt had already been determined. And, critically, at no time was the jury instructed to draw no adverse inferences from comparing one defendant's decision to testify with the other's silence.

[19] One possible source of the confusion is that the penalty phase witnesses were presented in a disjointed order One of Puiatti's mental health experts testified first, followed by all of Glock's witnesses and then the remainder of Puiatti's case. This order was adopted to accommodate the schedule of Puiatti's first expert But rather than allow Puiatti to put on the rest of his case following that expert's testimony, the trial judge agreed to Glock's request to put on all of his case before Puiatti could conclude his

defendants' mitigating evidence, it is highly likely the jury did as well.[20]

2. The Eleventh Circuit failed to recognize the Eighth Amendment implications underlying a joint capital penalty phase, relying instead exclusively on reasoning applicable to ordinary criminal proceedings. The court focused on the efficiency gains arising from joint trials generally, but never appreciated that the efficiency gains here, like many joint penalty phases, were nil. See *Taylor*, 293 F. Supp. 2d at 900 ("[T]he mitigating factors to be presented by each defendant are likely to be different for each defendant based on that defendant's particular background and circumstances. Thus, with one exception, the presentation of these factors will be extremely individualized and will not be highly repetitive in separate hearings."). The state put on no penalty phase evidence as to either defendant, and the joint proceeding lasted two days. Severed, sequential proceedings—two, one-day trials—would have taken the same amount of time.

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[20] Although opening statements could have reduced confusion and aided the jury in its consideration of each defendant's individual evidence, particularly given the disjointed order of witnesses, the court denied Puiatti's counsel's request to make an opening statement before the penalty phase, sustaining Glock's objection. (A-10/2216-17). The State had no objection to an opening statement, thus, but for Glock's opposition, Puiatti's counsel could have given one. Opening statements can have crucial and lasting impact on juries throughout the trial. See, *e.g.*, T. Pyszczynski & L. S. Wrightsman, *The Effects of Opening Statements on Mock Jurors' Verdicts in a Simulated Criminal Trial*, 11 J. Applied Soc. Psychol. 301-13 (1981), V A. Stone, *A Primacy Effect in Decision Making by Jurors*, 19 J. Comm'n 239-47 (1969).

Moreover, the Eleventh Circuit concluded that the joint penalty phase here was "particularly appropriate" because it prevented the jury from reaching "inconsistent verdicts." Pet. App. 69a. In reaching that conclusion, the court relied solely on the facts of the crime—*e.g.*, that the defendants' planned and effected the crime together, and that they had both confessed. *Id.* But the Constitution requires that the sentencer consider not only the circumstances of the offense, *but also* the individual backgrounds and unique characteristics of the defendants. See, *e.g.*, *Zant*, 462 U.S. at 879. The Eleventh Circuit misunderstood that the focus of a penalty proceeding is not to ensure that joint offenders receive the same sentence, but instead to evaluate each defendant's individual case in mitigation. "A consistency produced by ignoring individual differences is a false consistency." *Eddings*, 455 U.S. at 112.

3. The trial court's jury instructions exacerbated, rather than mitigated, the inherent prejudice of the joint capital penalty proceeding. The trial court *never* instructed the jury to consider each defendant's mitigating evidence "separately" or "individually." Nor did the trial court *ever* instruct the jurors to consider the aggravating and mitigating evidence relevant to each defendant only as to their advisory sentence for that defendant. Such instructions are commonplace in criminal trials generally, but were completely absent in the joint penalty phase here.[21]

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[21] The judge's instructions may have reflected his belief that the defendants *should* receive the same sentence. In a prior capital case, the same trial judge overrode a jury's life sentence recommendation where a codefendant received a death sentence. See *Miller v. State*, 415 So. 2d 1262 (Fla. 1982).

The jury charge the trial court did give left the jury with the inescapable conclusion that it was expected, if not required, to return the same sentence for both defendants. Compared to the charge given in *Tipton*, 90 F.3d at 892, which the Fourth Circuit concluded "reduced the risk of [de-individualization] to acceptable levels," the charge given here was woefully inadequate, repeatedly telling the jury to return a single advisory sentence:

- At the outset of the penalty phase in *Tipton*, "the court—obviously aware of the special risk—admonished the jurors that they 'must consider each defendant individually.'" 90 F.3d at 892-93. Here, the judge began his charge to the jury by instructing the jurors to "advise the court as to what *punishment* should be imposed on Mr. Glock and Mr. Puiatti" and "render to the court *an* advisory sentence." (A-11/2521) (emphasis added).
- In *Tipton*, the court reminded the prosecution to "'be specific'" and to "'do it individually,' whenever objections were made to Government counsels' references to the defendants collectively." 90 F.3d at 893. Here, when the prosecutor told the jury to treat the defendants "symbiotically" and like "two peas in a pod," (A-11/2482), the trial judge said nothing.
- In *Tipton*, the court reminded the jury to "make a decision regarding each defendant and each capital case." 90 F.3d at 893. Here, the judge told the jury to determine "*the* advisory sentence" of death or life imprisonment that should be imposed "in *this* case." (A-11/2524-25) (emphasis added).

Indeed, the trial judge here concluded his charge to the jury as follows: "you will now retire then to consider your *recommendation*. When seven or more of you are in agreement as to what sentence should be recommended to the court, *that form* of recommendation should be signed by our foreman and returned to the Court." (A-11/2528) (emphasis added). Not surprisingly, the jury here returned the same 11-1 verdict for both. This stands in marked contrast to *Tipton*, where the jury returned three different sentences, splitting their votes in different ways for each defendant, thereby reflecting their individualized treatment. See 90 F.3d at 893.

The Eleventh Circuit cited what it thought was the "pertinent part" of the jury instruction, Pet. App. 62a n.29, but that excerpt ignores the instruction's overall theme, and actually highlights the inadequacy of the jury charge.[22] It is the only portion that separately discusses Puiatti and Glock, telling the jury that it must recommend two sentences. But the judge does nothing to dispel the clear implication that the jury, having convicted both defendants of the same crime, must impose the same sentence on each. The jury was simply never told that it must consider the aggravating and mitigating evidence separately and individually as to each defendant, and never expressly instructed that it need not recommend the same sentence for both defendants.

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[22] In fact, the trial judge only strengthened the impression that the jury was to recommend the same sentences for both defendants. The instruction grouped the jury's task according to the *punishment*, not the defendant, telling the jury to consider death for both defendants and "on the other hand" consider life sentences for each. See Pet. App. 62a n.29.

In sum, prejudice pervaded the joint proceeding: The jury heard only from one of the two co-defendants, and was left free to infer that the silent defendant felt no remorse for the crime; Puiatti's mitigation theory was defeated not by the State's questioning or evidence, but by evidence introduced by his codefendant that would largely have been inadmissible in a severed proceeding; and the trial judge's instructions only amplified the risk of prejudice from the joinder of the defendants. Together, these factors deprived Puiatti of his right to an individualized sentencing decision. The Eleventh Circuit's decision that the Eighth and Fourteenth Amendments were not even implicated by the joint proceeding is incorrect.

CONCLUSION

For the foregoing reasons, this Court should grant a writ of certiorari to the Eleventh Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS,
ELEVENTH CIRCUIT.

No. 09-15514.

CARL PUIATTI,
Petitioner-Appellee,

v.

WALTER A. MCNEIL,
Secretary, Florida Department of Corrections,
Respondent-Appellant.

Nov. 29, 2010.

Before HULL, PRYOR and MARTIN, Circuit Judges.

HULL, Circuit Judge:

Carl Puiatti, a Florida inmate under a death sentence, filed a 28 U.S.C. § 2254 petition for a writ of habeas corpus that challenged his convictions and death sentence. The district court denied the petition as to Puiatti's convictions but vacated Puiatti's death sentence. The district court concluded that the state trial court's denial of Puiatti's motion to sever his penalty phase from his co-defendant's violated Puiatti's constitutional right to an individualized determination of sentence. The State appealed. After review and oral argument, we reverse and remand this case with directions to consider Puiatti's remaining § 2254 claims as to his death sentence.

I. BACKGROUND

A. 1983 Crime and Confessions

On August 16, 1983, Puiatti and Robert Glock kidnapped, robbed, and murdered Sharilyn Ritchie. Puiatti (age 20) and Glock (age 22) confronted Ritchie as she got out of her car in the parking lot of a shopping mall in Bradenton, Florida. Glock pulled out a .38 pistol and forced Ritchie into the backseat of her car at gunpoint. Puiatti and Glock got in Ritchie's car, Glock took $50 from Ritchie's purse, and Puiatti drove them to Ritchie's bank, where they made Ritchie cash a $100 check. Then Puiatti drove Ritchie more than 60 miles, to an orange grove outside Dade City, Florida. Puiatti took Ritchie's wedding ring and left her at the roadside.

After driving away for a short distance, Glock said he thought they should kill Ritchie, and Puiatti agreed. Puiatti turned the car around, and when the car pulled abreast of Ritchie, Puiatti shot her twice from inside the car. Puiatti began to drive away, but when Glock saw Ritchie was still standing, Puiatti handed the gun to Glock, turned the car around, and drove by Ritchie again. Glock shot Ritchie. When Ritchie still did not fall, Puiatti made a third pass and Glock shot Ritchie again. Ritchie collapsed and died from her injuries.

Four days later, on August 20, 1983, Puiatti and Glock were in Ritchie's car in New Jersey, with Glock driving. A state trooper stopped them because Ritchie's license plate was improperly displayed. Neither Puiatti nor Glock had a valid driver's license. When Puiatti opened the glove compartment to find the car's registration, the state trooper saw a handgun that was later identified as the gun used to kill

Ritchie. The state trooper searched the car and found another handgun. He arrested Puiatti and Glock for possessing handguns without a permit. After Puiatti and Glock were taken to the police station, police officers discovered that the car they were driving was stolen and its owner had been murdered.

The New Jersey State Police assigned Detective John Quinlan to interview Puiatti and Glock. On the evening of August 20, Detective Quinlan questioned Puiatti and Glock for about 15 minutes each, at which time Glock admitted he had stolen the car. On the evening of the next day, August 21, 1983, Detective Quinlan, along with Florida detectives August Stahl and James Wiggins, questioned the defendants again. The detectives questioned Puiatti and Glock separately, for about an hour each. Puiatti, who was interviewed after Glock, initially claimed Glock picked him up in Ritchie's car to give him a ride to New York and that Puiatti knew nothing about the theft of the car or Ritchie's death. After the detectives told Puiatti that Glock already gave a statement about Ritchie's murder, Puiatti said, "I might as well tell you," and gave a statement about the murder.

Puiatti's and Glock's individual confessions, which they gave initially, differed from each other in only two ways: (1) although Puiatti and Glock each confessed to shooting Ritchie, they differed on who fired which shots at her; and (2) they each claimed the other man instigated the killing.

Puiatti and Glock were extradited to Florida. On August 24, 1983, Detective Stahl asked Puiatti and Glock if they would give a joint statement confessing to their involvement in Ritchie's murder, and they agreed. Puiatti and Glock's joint confession resolved the inconsistencies in their individual confessions.

Their joint confession stated that Glock had suggested shooting Ritchie, Puiatti fired the two shots on the first pass, and Glock fired the shots on the second and third passes.

B. Denial of Motions to Sever

Before trial, Puiatti moved to sever his trial from Glock's, arguing a joint trial was prejudicial. Puiatti alleged that material differences existed between Puiatti's and Glock's individual confessions and that a joint trial interfered substantially with the jury's ability to make an impartial decision as to Puiatti's guilt or innocence and its recommendation of a life or death sentence. Puiatti focused on the defendants' individual confessions and likely antagonistic defenses. Puiatti argued that failure to sever violated the Florida Constitution and the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

The state trial court denied Puiatti's motion to sever.[1] The state trial court considered the effect of any differences in the defendants' individual confessions on the penalty phase and concluded any difference was clarified in their joint confession.

C. 1984 Guilt Phase

Puiatti's and Glock's trial began March 19, 1984. The State called witnesses to testify about, among other things, the discovery of Ritchie's body, the ensuing police investigation, the extent of Ritchie's injuries, the cause of her death, and the New Jersey traffic stop that led to Puiatti and Glock's arrests. Detectives from New Jersey and Florida testified that

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[1] The state trial court already had denied Glock's earlier, independent motion to sever.

Puiatti and Glock made individual tape-recorded statements to police, confessing their involvement in Ritchie's murder. The State played for the jury the tape-recorded individual confessions of Glock and Puiatti. The state trial court instructed the jury not to consider Glock's individual confession as evidence against Puiatti, and vice versa.

The State's last witness was the court reporter who recorded and transcribed Glock and Puiatti's August 24, 1983 joint confession. The court reporter testified the transcript accurately reflected the defendants' statements and then read the joint confession transcript into the record.

Puiatti's counsel renewed his motion to sever, which the state trial court denied. The joint confession was read in open court.

In the joint confession, Puiatti and Glock acknowledged and waived their *Miranda* rights.[2] Detective Stahl asked Puiatti to describe the incident:

> Now, what I want you to do is, uh, so each one of us knows what the other is saying, I want you to go through the whole details of the incident from the time it started in Fort Myers and work right back up to the point where you stopped on the New Jersey Turnpike in the State of New Jersey. Okay. When one talks and one leaves out something, the other one can fill in, but don't talk at the same time. Puiatti began, describing how he and Glock kidnapped and robbed Ritchie:
>
> We walked to a Shop and Go Store near Bradenton and called a taxicab to take us to the

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[2] Puiatti stated he felt "[a] little bit tired but otherwise okay" and he did not mind giving this statement.

mall. We got to the mall about 8:00 o'clock that morning, and, uh, hung around until it opened. And that day we watched a couple of movies in the mall and we were kind of looking around in the parking lot for a customer to come in to try to get their car. We had no luck that day.

That night, later that night, we tried to hitchhike out of town and tried for a couple of hours, and it was about 1:00 o'clock in the morning and we had no luck. So there was a truck parked over by the mall and it was open, so we went in and slept for a few hours until that morning.

....

Okay. The following morning, which was Tuesday, the 16th, we went and got something to eat. And we were getting very low on money, so we waited around the mall parking lot until it opened again. And I'm not sure of the exact time.

Do you remember the time when she came?

....

Mr. Glock: It was approximately 10:20-10:30.

Mr. Puiatti: About 10:30 that morning a woman pulled into the mall parking lot in ... an orange 1977 Toyota SR-5 Corolla. That's what it was, Corolla.

At that time when she pulled in she had opened the door and started to get out of the car, and Robert had a handbag with a .38 in it and went up to her, put the gun on her, and she started to scream. And he told her to get in the backseat.

> At that time I got in the car and started—and got behind the driver's wheel and started to pull out of the mall.
>
> At that time Robert went through her purse and found fifty dollars and also found that she had a, uh, bank account. So she's offering to go to her bank and withdraw some money for us, and we—so we went to the Palmetto Bank on Palmetto Avenue and withdrew a hundred dollars in four twenties and two tens. She wrote out a check, and we went through the drive-through and withdrew it.

Puiatti said that he drove the car northbound until he found a dirt road through orange groves near Dade City, Florida. Puiatti drove the car through the dirt road until he saw a street, then turned around and stopped the car about halfway down the dirt road. Puiatti said they let Ritchie out of the car and, at her request, gave Ritchie her purse and her husband's baseball glove. They took her wedding band and diamond ring.

Puiatti and Glock jointly described how Glock suggested shooting Ritchie, how Puiatti fired the first two shots, and then Glock fired the rest, as follows:

> By Detective Stahl: Question: Then what happened when you let her out of the car?
>
> Mr. Puiatti: Okay. We left her and started to take off. And as we were taking off, we started talking back and forth, and *Robert said to me that he thought that we should shoot her.* And after going back and forth a little bit, I agreed, and turned the car around.

Then we drove up next to her and acted like we were looking for directions, and I shot her in the right-right by the right shoulder, and drove off.

When I was driving off, Robert noticed that she was still standing.

Mr. Glock: There were two shots fired at her, and then—interrupted—

Mr. Puiatti: You tell it.

Mr. Glock: *When we first turned around and came back toward her on the first time, he shot the first time and hit her in the shoulder, the right shoulder, and then fired a second time. I don't know if the second time he hit her or that was when he missed her and hit the tree or whatever.*

Mr. Puiatti: Yeah.

Mr. Glock: *I don't know if he missed the second shot or not.*

Mr. Puiatti: Yeah. It was because—interrupted—

By Detective Stahl: *Question: You agree with that, Carl?*

Mr. Puiatti: Yeah.

Question: Go ahead, Bobby.

Mr. Glock: Then we kept on driving, and I noticed that she was still standing. Carl turned around and handed me the gun at that time and drove back by her, and I fired a shot. No, I fired two shots at that time.

Mr. Puiatti: Yeah.

Mr. Glock: I fired two shots. Uh, then we kept on driving back by, turned around again, (pausing).

Mr. Puiatti: Went back by again, stopped, (pausing).

Mr. Glock: Yeah. Stopped and turned around and headed back toward her.

Mr. Puiatti: (Affirmative nod.)

Detective Wiggins: She was still standing?

Mr. Glock: I only fired one shot at that time. Only fired two shots the whole time.

Mr. Puiatti: Three.

By Detective Stahl: Question: I just want to interrupt you. *Carl, at the time when you said you shot her once in the shoulder, then you shot in the chest; didn't you?*

Mr. Puiatti: Yes, I shot her twice.

Mr. Glock: It was the third shot that you missed.

Mr. Puiatti: *So those first two, yeah.*

Question: So you shot her twice, Carl.

Mr. Puiatti: Yes.

Question: Once in the shoulder, you said (interrupted).

Mr. Puiatti: And once in the chest area.

Question: Chest. And how many times—how many shots did you—(interrupted.)

Mr. Glock: Two.

Question: So how many shots in total did you fire?

Mr. Glock: Me?

Question: Yeah.

Mr. Glock: Two.

Question: And—(pausing)

Mr. Puiatti: Altogether, five. One missed.

Question: One missed. So that was a total of five shots?

Mr. Glock: The sixth shot got hung up in the gun and we didn't worry about it.

Question: Okay. And how many times did you go back now?

Mr. Glock: We passed by her once-twice-three times.

Question: Three times you went back and on the third time what happened?

Mr. Glock: That's when I fired my second and final shot, and that's when she—as we were driving away after the last shot, she fell over.

Mr. Puiatti: She walked about ten yards and then fell over.

(Emphasis added).

Afterward, Puiatti said they drove to Ocala, Florida, where they pawned Ritchie's rings for $200, drank beer and played pool. Puiatti and Glock drove to Columbia, South Carolina, where they visited Glock's sister and a friend of Glock's, and then they went fishing. Glock pawned the CB radio from Ritchie's car

for $20. They drove north until they were stopped and arrested on the New Jersey Turnpike.

Puiatti and Glock identified several pieces of physical evidence collected by police: the hundred-dollar check, Ritchie's purse, pawn tickets, the murder weapon (the .38 pistol) and the other firearm recovered from Ritchie's car. Puiatti and Glock were asked if they had anything else to say, and they averred that their crimes occurred as they described them and they were in full agreement with each other's statements:

> Question: All right. I have nothing more to say. Do you have anything to add, Carl Puiatti, to the statements made?
>
> Mr. Puiatti: Just that I have been treated very fairly by the two detectives and, umm, everything I've said is the truth and the exact way that it happened.
>
> By Detective Stahl: And, Robert Glock, is there anything that you want to add?
>
> Mr. Glock: Just the same thing that Carl just answered.
>
> By Detective Stahl: Question: All right. *And are you both in full agreement with each other as to the statement you've made, that the incident came down exactly that way?*
>
> *Mr. Puiatti: Yes.*
>
> *Mr. Glock: Yes.*

(Emphasis added.)

After presenting the court reporter's testimony reading the defendants' joint confession, the State introduced into evidence two checks, Ritchie's two

rings, and the vehicle registration for Ritchie's car. Then the State rested.

Neither Puiatti nor Glock presented evidence. In their closing arguments, they did not contest guilt on the kidnaping and robbery charges, but argued the evidence merited a conviction for second-degree murder, not first-degree murder.

The jury's verdict found Puiatti and Glock guilty of first-degree murder, kidnaping, and robbery with a firearm. The State presented no evidence in the penalty phase.[3]

D. Glock's Penalty Phase Evidence

Glock first called Dr. Gerald Mussenden, a clinical psychologist, who examined Glock in jail. Dr. Mussenden testified Glock was reading at a ninth-grade level, had impressive spelling and relatively strong math skills, and was "functioning at his level of intelligence." Dr. Mussenden did not state what Glock's IQ was, but he testified that Glock was "in the average range of intelligence." Dr. Mussenden testified that Glock: (1) had "moderate personality skills implying that he had some adequate control and inhibitions"; (2) had "some ability to relate to people in a friendly, sociable manner" and was "fairly objective in what he perceives"; (3) was "sensitive to others" and "certainly likes to receive some kind of affection"; (4) had "good feelings for guilt or remorse

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[3] Before the defendants presented their penalty-phase evidence, Puiatti's counsel inquired whether the state trial court would permit the defendants' family members who were present during the guilt phase to remain in the courtroom for the penalty phase. The State argued the rule of sequestration applied in the penalty phase. Glock's counsel concurred. The state trial court ruled that the rule of witness sequestration applied

and does experience conflicts of his behavior"; (5) had "a strong desire to relate to people" and (6) would have liked, in the past and the present, to "have a better relationship with his family and with others." Dr. Mussenden found these difficulties in Glock's personality, including that he: (1) had "difficulty relating to authority, whether it's male or female"; (2) had "a problem relating to women" in general; (3) had "a very poor self-concept, extremely sensitive to his height or shortness"; (4) felt "very bad about who he is [,] ... what he's not done to date[, and] ... like a failure"; (5) had "some self-destructive tendencies" that he "turns ... on himself" when he is angry and (6) was "also ... somewhat easily led," and "somewhat easily influenced by someone who would want to be friendly and create an atmosphere where he could feel comfortable."

Dr. Mussenden also opined that at the time of Ritchie's murder, Glock was "cogn[i]tive," "knew right from wrong," "could appreciate the quality of his behavior," and had reached a "culmination of a history of problems" Glock had had for years. Dr. Mussenden described Glock's background problems: (1) his father left when he was two years old; (2) Glock was "extremely disruptive," which Dr. Mussenden attributed to poor parenting; (3) at the age of 13, Glock was sent to live in an institution, which Dr. Mussenden described as "the ultimate rejection ... for any child to experience"; (4) Glock was sent to live with his father at age 14, which did not work out well, causing additional feelings of failure; (5) Glock later joined the military, but again had problems; and (6) Glock left the military and worked a variety of jobs that "didn't work out very well." At that point, at age 22, Glock "no longer had a job, had bills, [and] couldn't go home to his father, to his

stepmother." Glock met Puiatti and they developed a comradeship in part because Puiatti "would pay attention to him,... was willing to give him some support, and ... understood the problem." Glock "could identify with Puiatti because [Puiatti] was also without a job and [had] no place to go."

According to Dr. Mussenden, the murder of Ritchie was an expression of Glock's anger toward women and Glock's feelings of failure and rejection all his life. Dr. Mussenden added that murder was not something Glock normally would have thought of or done. According to Dr. Mussenden, although Glock had a high level of family discord, he showed few or no signs of sexual deviancy, antisocial personality, or impulsiveness. Glock "basically doesn't have a criminal profile." Dr. Mussenden opined that Glock had a very good potential for rehabilitation because he was young, fairly intelligent, had feelings of guilt and conflict about his behavior, and was not as prone to destructiveness toward others as he was to self-destructiveness.

During the State's cross-examination Dr. Mussenden testified that Glock had problems relating to female authority figures, which made him more likely to choose a female victim for a crime. Dr. Mussenden stated that Glock "would follow anyone who appears to be fairly assertive and will give him a minimal amount of attention," and "[s]hould this person be involved in any type of anti-social behavior, [Glock] may be a quick subject to follow," though "[i]t would depend on the act itself." Dr. Mussenden testified that Puiatti "gave [Glock] the type of things he was craving for." When asked whether it was fair to say Glock and Puiatti each gave the other something the other needed, Dr. Mussenden stated he would

"imagine that if [Puiatti] also had similar needs or anything similar to that, then, yeah, they may have been able to support each other and felt very comfortable with each other because of their deficiencies." Dr. Mussenden admitted there was "a contradiction" between the facts of Glock's and Puiatti's abduction and murder of Ritchie and Dr. Mussenden's conclusion that Glock was not destructive to others. Dr. Mussenden stated that he thought "a possible explanation, the only explanation I have [,] is that had [Glock] not had this association that he made on the date of this crime, he would not have been involved in this incident, such an act. This is a really bad, destructive association."

On cross-examination by Puiatti's counsel, Dr. Mussenden was asked if his findings were consistent with the fact that it was Mr. Glock's idea to shoot Ritchie.[4] Dr. Mussenden answered that it would be atypical behavior for Glock, and Dr. Mussenden still believed Glock "would need someone else to do something of this nature." However, Dr. Mussenden admitted his conclusions did not negate the possibility that it was Glock's idea to commit the crime, or that it was Glock who fired the final shot at Ritchie.

Glock called his stepmother, Willie Mae Glock. Mrs. Glock testified about how she and Glock's father (her husband) found Glock in an orphanage when he was fourteen and got legal custody of him. Mrs. Glock testified that she talked to Glock while he was in jail awaiting trial for Ritchie's murder, and that Glock

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[4] The State objected that the question was a hypothetical based on facts not in evidence. After reviewing the joint confession transcript, the state trial court overruled the State's objection.

was "[v]ery depressed," "sorry that it happened," and "mostly fe[lt] sorry for the family that it happened to." Mrs. Glock did not believe Glock "intentionally [did] it" because it was "not [Glock's] nature." Glock was more of a follower than a leader.

On the State's cross-examination, Mrs. Glock admitted that Glock had a problem with anyone telling him what to do because he "never had anyone to discipline [him] or teach him right from wrong." Glock "has had to survive any way he could ever since he was eight years old. He had no mother or father. He's had to survive the best way he knew how." Puiatti had no questions for Mrs. Glock.

Glock called Tammy Yonce, Glock's sister, to testify. Yonce testified that her and Glock's mother was "a committed alcoholic" who physically and mentally abused Glock and Yonce until a court removed Glock from the home and put him in an orphanage when he was about thirteen years old. Their mother beat Glock almost daily for minor infractions, called him names, "did not approve of who he was" and "did not like him because of who his father was." Glock's mother later disowned him.

Yonce also testified that Glock told her several times that he was sorry for killing Ritchie, that he wished he had not killed her, and that he did not intentionally do it. Yonce characterized Glock as more of a follower than a leader.

Glock's counsel then called Glock to testify.[5] Glock testified that he felt "a lot of remorse and more or less sorrow" for "the victim and her husband." Glock

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[5] Puiatti's counsel renewed Puiatti's motion to sever the penalty phase, which the state trial court denied.

was 22 years old and had never been convicted of a crime before. Glock had a "very hectic" relationship with his mother and he "never really had a relationship" with his father, although there were "good feelings between us." Glock had had no disciplinary problems while in jail. Glock was "sorry about what happened. If there was anything I could do to bring her back, I would do it."

Neither the State nor Puiatti's counsel cross-examined Glock. Glock then rested.

E. Puiatti's Penalty Phase Evidence

Puiatti's first witness was Dr. Donald DelBeato, a forensic psychologist, who examined Puiatti. Dr. DelBeato felt comfortable enough with Puiatti during the examination that he removed Puiatti's manacles and asked the accompanying deputy to leave them alone in the room together. In the interview, Puiatti "tended to underplay" his drug usage, but Dr. DelBeato learned from the interview and other information that Puiatti had used marijuana regularly for several years and also used LSD and some cocaine. In his personality profile and clinical interview, Puiatti was, in Dr. DelBeato's opinion, being truthful.

Dr. DelBeato opined that Puiatti was "a rather insecure young man" with "an inability to sometimes deal with stress and react appropriate[ly]." Dr. DelBeato found no antisocial tendencies. Puiatti was remorseful for Ritchie's murder. Puiatti scored a 95 verbal IQ and a 78 performance IQ. Dr. DelBeato testified that "if we were in school and the teacher wanted to know what [Puiatti's] IQ is, I would say he would probably be average."

Although Puiatti's remote and recent memory were normal, Dr. DelBeato found there was "a dysfunction to the right hemisphere of [Puiatti's] brain," in the frontal or frontal parietal area which is the emotional center of the brain. Puiatti had impairments in concentration and patience. Puiatti had "emotional instability syndrome," which "could make him edgy, moody, and not know why or [be] easily influenced."

According to Dr. DelBeato, Puiatti's dysfunction expresses itself when Puiatti is under stress or under the influence of alcohol or some other toxin. As a result of his brain dysfunction, Puiatti is "[v]ery easily manipulated." Puiatti is "more easily aggressive, more easily violent, more easily influenced, edgy,... may do something that [he] ordinarily would not have done, to make unusual choices." Dr. DelBeato opined that at the time of Ritchie's murder, Puiatti was under stress, and as a result he "would have been more easily dominated by another individual" and "more likely to do something that he would not normally do or that he would not do if he were alone."

On cross-examination by Glock's counsel, Dr. DelBeato admitted that (1) most people are more easily influenced when they are under stress, (2) whether Puiatti was influenced by Glock depends not only on Puiatti's psychological profile, but also on Glock's, and (3) Dr. DelBeato never examined Glock.

On the State's cross-examination, Dr. DelBeato clarified that his opinion was that there was "a very good probability" that Puiatti's right-side brain dysfunction affected his behavior during his kidnaping and murder of Ritchie. Dr. DelBeato could not say with certainty that that was the case because in his profession, "there are no certainties." Dr. DelBeato

also could not say with certainty that Puiatti was under extreme duress or the substantial domination of another person, but only that Dr. DelBeato's diagnosis was that Puiatti "could have been easily influenced." Dr. DelBeato testified that Puiatti's conduct as to Ritchie would likely not have been the same had Puiatti been by himself. Dr. DelBeato opined that Puiatti could appreciate the criminality of his conduct, but was, within a reasonable probability, substantially impaired in his ability to conform his actions to the requirements of the law "because of the way the damage that is there [in Puiatti's brain] affects aggressiveness."

Puiatti called his mother, Linda Puiatti. Mrs. Puiatti testified about Puiatti's childhood in New York and how Puiatti befriended other children who were picked on by other kids, how he started working in the family's deli business after school when he was 12, until the family had financial troubles and lost the business. At age 16, Puiatti started "hanging around with the wrong crowd" and using drugs. Puiatti's family got Puiatti to see a counselor about his problems, but eventually they could not afford the cost.

The Puiatti family moved to Florida to get a new start. Puiatti quit school when he was 16. When his mother tried to get him to go back, Puiatti told her the family needed him to get a job more. Puiatti later joined the Army to better himself. Puiatti had trouble keeping up in the coursework he had in the Army, and he continued to use drugs. Puiatti requested and received an honorable discharge from the Army. He returned home and found a job, where he met his future wife.

After Puiatti, at age 19, married, his relationship with his wife was one "of constant fighting." In all Puiatti's arguments with his wife, he never struck her. Puiatti had financial trouble and for a time had to move, with his wife and her daughter, to live with Puiatti's parents. Later Puiatti was arrested for helping a friend commit a burglary. While Puiatti was on probation, Mrs. Puiatti tried to get him help for his continuing drug problem.

Puiatti and his wife had a baby boy who was born two months premature and who died after two months. By the time the child was born, Puiatti's wife had met another man, and she would not let Puiatti see their son. Puiatti never saw his child in person, though he got a photograph that he carried with him.

Puiatti became very troubled after the death of his baby son. Puiatti also suffered constant chronic chest pain. Puiatti's teeth hurt, too, but he could not afford to see a dentist. Puiatti continued with his drug use and lacked motivation to do anything with his life. Puiatti moved in with his parents and could not find a job.

Mrs. Puiatti testified that up until the time Puiatti was arrested for Ritchie's murder, he was not violent. Instead, Puiatti "demonstrated a lot of love to us, a lot of caring, a lot of helping, trying to help us through our difficult financial time."

Puiatti's next witness was his sister, Angela Thatcher, who became aware that Puiatti was using drugs when he was about 14 or 15 years old. Puiatti became very moody and "very obnoxious at times." While growing up, Puiatti tended to befriend misfits. Puiatti was never violent. Although Thatcher and Puiatti "argued as brother and sister will, ... he

always verbally abused but never physically—he never struck out or hit anybody in our family or anyone else to my knowledge."

Over the past few years, Puiatti became depressed, but in the last year before his arrest he "was starting to make a new start for himself." Puiatti "was really into working as a chef." Puiatti told Thatcher he was "trying to lead the more or less straight and narrow path and not get into any more trouble." Thatcher "found it hard to believe and, yet, I tried to believe it, because I wanted to hope that he would change and that he would get his life together and get on the right track." Puiatti "was very depressed over the death of his son and ... felt very tormented that he had never seen the child."

Puiatti called his father, Victor Puiatti, as a witness. Victor Puiatti testified that in the months before the murder, Puiatti was under a lot of pressure from his probation officer to pay back an outstanding fine:

> [Puiatti] had to pay a fee once a month of ten dollars to the probation department, and I used to take him down to pay this money, and there was an outstanding fine of a thousand dollars to be paid within a few months. My son was having a hard time making, seeing to it that this was being paid. On one occasion we went down to pay the ten dollars on the third of the month, and the probation officer said that being as he was behind it looked like that he wasn't going to pay this, and I assured him that he was going to pay it, and that I was going to help him pay this. And he said, "Well, if you don't pay it, I can assure you that I personally will see that you get fifteen

> years in prison out of this," which upset him, my son and myself, very much.

Puiatti was doing his best to pay the fine on time, but he had trouble getting to work because he lost his driver's license after he got a series of tickets.

In the months before the murder, Puiatti was also very depressed. After his son died, Puiatti was increasingly depressed and stayed in his room most of the time. Puiatti said he should be dead with his son. One time during that period, Victor Puiatti got angry at Puiatti for his negative attitude, raised his voice at Puiatti, and shoved him. Puiatti did not strike out, instead telling his father that if it would make him feel better to hit Puiatti, to go ahead and hit him. Victor Puiatti spoke to Puiatti after Ritchie's murder, and his son was truly remorseful for what happened.

Puiatti's final penalty-phase witness was psychiatrist Dr. Richard Meadows. Dr. Meadows examined Puiatti, spoke to Puiatti's family members, reviewed Dr. DelBeato's findings, and reviewed materials from the case, including Puiatti's confessions. Dr. Meadows performed a mental status examination on Puiatti and spoke with Puiatti about his mental condition, legal circumstances, background, and psychiatric and medical history. Dr. Meadows found Puiatti truthful during the evaluation.

Dr. Meadows concluded that Puiatti suffered from "several mental illnesses," including avoidance personality and addiction to alcohol and marijuana:

> I was of the opinion that [Puiatti] was suffering from several mental illnesses as well as a history of some physical illness I thought that he had an emotional problem that we label as avoidance personality. In the older diagnostic manuals,

> that was called inadequate personality. I thought from reviewing Dr. DelBeato's reports and my own impressions in talking with Carl [Puiatti], it was highly suspect that he may have some brain damage. Um, he had a history of several head injuries in which he probably had a concussion. Whether or not there was any lasting damage from this, I would not be able to say. He had a history of having had suffered pains in his face and head from teeth problems, and he had a peptic ulcer approximately a year or so before .... I feel he also had a severe dependence. Some people would call it addiction, some dependence-depending on which diagnostic frame you're talking about—on alcohol and marijuana.

Dr. Meadows described avoidance personality as "an extreme sensitivity to feelings of rejection by other people" and a tendency to misinterpret other people's comments as a criticism of oneself. Dr. Meadows described people with avoidance personality as being "suggestible or influenced easily by other people":

> They appear to be shy, although very often they will very much like to be more involved with people. They have a tendency to wish to have an unconditional acceptance by other people. Um, they have a very poor image of themselves. They often tend to be very self-critical. They tended to be suggestible or influenced easily by other people. They tend to depend on other people for approval to make them feel secure and comfortable and good about themselves. And, also, they tend to depend on other people for their care and security, um, and these are tendencies to want to lean on somebody or need somebody else's

approval. That is a rather extreme degree, usually.

Dr. Meadows also explained the basis for his suspicion of possible brain damage:

> I felt in talking with Carl [Puiatti] that there were a number of things about the way he said them and what he said that indicated to me in a very subtle way that there was the possibility of his having brain damage. The We [chs]ler Adult Intelligence Scale that Dr. DelBeato administered showed a wide difference in verbal and performance aspects on this test, and it's been, um, I don't recall in my experience that I've ever seen somebody with that wide a spread of differences in their ability to deal with the verbal part and the performance part who did not have some sort of brain damage. Um, the other things that concerned me [were] the, if his history is accurate, of the very large amounts of marijuana that he had used over the years, plus the alcohol, led me to suspect that you do get death of brain cells with alcohol and you get seven or eight times that high of a rate of death of brain cells with marijuana.
>
> Um, added to this with the indication of emotional instability, poor judgment, poor impulse control—these would all go along with damage in the brain[,] particularly in these right frontal regions.

Dr. Meadows opined that Puiatti's right-side brain damage probably contributed to Puiatti's increasingly impaired judgment:

> [Puiatti] seemed to have the left brain function more preserved than the right. This would lead

> me to think that it was probably a contributory factor in the increasingly impaired judgment that he couldn't stand tension as easily. He was more impatient—more emotionally unstable—that his reality testings [were] not always that good.
>
> ....
>
> ... I think this would cause a progressive[ ] deterioration in his judgment which would fluctuate depending on the amount of stress he was under.

In Dr. Meadows's opinion, Puiatti suffered from "a progressive brain damage ... probably due to the use of pot and alcohol—more likely that than the head injuries that he had, and that played a part in it and made him ... less stable." Dr. Meadows opined that Puiatti, on an emotional level, functioned like a child of 10 or 11.

Dr. Meadows also explained what factors in Puiatti's history led to Dr. Meadows's diagnosis of avoidance personality:

> I think Carl [Puiatti] ... started life with some potential and interests and assets and things going for him, but problems showing up very early in his childhood and then he experienced a series of rather major traumas throughout his life. One was in addition to that a number of ongoing ones, um, such as getting rheumatism when he was eleven or twelve and not being able to follow a professional sport career as he very much had his heart set on. I think he was going down the tube socially, scholastically and [in] other areas when he was around fifteen or sixteen with family problems with finances.

> At that point the family moved to Florida. I think he got his hopes up about getting another start when he joined the service. I think this was another discouraging, disheartening experience for him. Um, and I think things continued from that point on progressively after he left the service to become just one series of boon-doggings in practically every area of his life that gave him more and more of a sense of depression, futility, numbing out his feelings, functioning less and less effectively in every area of his life, and this pattern continued almost progressively downhill until the time of the tragedy that brought us here.

Dr. Meadows opined that Puiatti's life showed a pattern of disintegration over the year or more leading up to Ritchie's murder:

> He was still in his early twenties, unable to break the apron strings and function independently. He was living in and out of his parents' home, he was unable to work continuously and hold a job. He was relying heavily on alcohol and pot. He was still following his pattern of taking in outcasts or people that were kind of misfits where he felt he would be accepted. His marriage was breaking up, um, he had a great deal of investment in the child that was born of that marriage.
>
> I think the death of that child and not being able to see the child added to his burdens-economic problems mounted. I think he felt under pressure to make payments in a number of areas, um, I think he felt pressure from his probation officer, um, he got in more and more jams with DWI's, lost his driver's license, um, he

> was concerned about causing, you know, more problems at home with his younger brother who was also in the middle of all this family turmoil where his folks were trying to help him and his wife out, plus this other fellow that they took in under their wing, the younger brother—he felt very close to—was having some kind of educational difficulties requiring special attention.
>
> ....
>
> ... [T]his concatenation of events that kept escalating, I think, led him to feel more and more ... a sense of futility and depression. There was suicidal ideation, there was development of an ulcer which is the same thing which has been repeated psychologically earlier when he was in his teens when he felt life was futile.

Dr. Meadows testified that just prior to the crime, Puiatti was at his lowest point psychologically. For many years Puiatti had used marijuana and alcohol heavily. Then Puiatti went three or four days without any marijuana, which could cause "an intense psychological withdrawal experience that's very unsettling to some people."

Dr. Meadows testified that Puiatti's personality profile was not one of a violent person. Dr. Meadows explained:

> [Puiatti's] rearing ... imbued [him] with a rather strong moral code which would not permit him in good conscience to do harm to other people. He was not the sort of person who seemed to enjoy hurting other people. He had always avoided open conflict to a great extent—go to his room and pound on a pillow, get drunk, withdraw, play music in his room, um, he had none of the—well,

> people who usually get violent who have emotional problems tend to be more of a paranoid schizophrenic or anti-social diagnostic groups. He fit none of these categories. He has none of these indications that I can see of people who most usually, if they're not a professional criminal get into violence because of, um, the urge to be in control or dominance of somebody else or to evince some hostility or some perverse cruelty to somebody else.

Dr. Meadows further opined that Puiatti had "a number of things going for him on the plus side that would argue in favor of rehabilitation." Dr. Meadows believed Puiatti (1) felt genuine remorse at what he'd done and (2) would be able to function and improve himself within the structured confines of the prison system.

Dr. Meadows also believed Puiatti was easily influenced and under the substantial domination of another person at the time of Ritchie's murder:

> Q. Now, another question that's important for us here today is whether [Puiatti] was suffering from the substantial domination of another person. What is your opinion about that—whether he was at the time of the crime for which he has been convicted?
>
> A. I thought so.
>
> Q. Can you tell us why?
>
> A. I think it's in his nature to be easily influenced. I think it's a very scary thing for him to do anything which causes somebody else to disapprove or to stand up for himself against them. And as I understand it from the way events

were transpiring, he was being leaned on rather heavily, um, by the co-defendant.

Q. Would this be a function, again, of both [Puiatti's] mental illness and the brain damage, the brain dysfunction that you have described?

A. I think so. I don't think you can really separate the two at this point. I couldn't give you a percentage, but I think they continuously operate together.

Dr. Meadows characterized Puiatti's mental state at the time of the crime as "substantially impaired":

Q. Okay. Do you have an opinion as to whether the capacity of [Puiatti] to appreciate the criminality of his conduct and to conform his conduct to the requirements of law was substantially impaired at the time of the crime?

A. I thought it was substantially impaired at that time, yes.

Glock's counsel then briefly cross-examined Dr. Meadows, asking only three questions. Dr. Meadows admitted that whether Puiatti was under the substantial domination of another person at the time of the crimes might depend on the psychological profile of the other person. Dr. Meadows had not performed any tests on Glock or seen any psychological testing reports on Glock.

At the close of evidence, Puiatti renewed his motion to sever, which the state trial court denied, stating:

[T]his is the classic example of why joint defendants ought to be [tried] together in order to get justice. If there are no overriding reasons for separating them like [*Bruton*] testimony or something like that, I really am convinced even

more so now than at the time I made the ruling that the denial of the motion to sever was correct.

F. Penalty Phase Arguments and Verdicts

In the penalty phase closing arguments, the State discussed the testimony of the three mental health experts retained by the defendants, and agreed defendants Puiatti and Glock were both followers, not leaders:

> [T]hese guys are like—two peas in a pod—the old cliche, as alike as two peas in a pod.
>
> What did the doctor say about them from the tests and from what other people say? They both have average intelligence, memory, both of them notwithstanding what counsel has tried to get across through their witnesses, both of them apparently are heavily dependent on other persons. They're followers[ ], not leaders.
>
> One of the questions I asked was would either one of these have been likely to do this crime by themselves. The answer was no—so, I would submit to you, thoroughly from the evidence, there's no reason to treat them any differently. I think that's what the evidence indicates. They are very, very, very similar.
>
> I think some of the high school biologists talk about symbiotic relationships, one that depends on the other—they wouldn't have taken this woman by themselves. They needed the other one to boo[s]t his bravery, to make him do things he wouldn't ordinarily do or actually do—the thing that he wouldn't have the guts to do ordinarily. That's what, they's why they got together.

Glock's counsel argued, among other things, that Glock committed the crime while under extreme duress. Glock's counsel did *not* argue Puiatti dominated Glock. Rather, Glock's counsel rested his closing argument on the duress prong of the statutory mitigating factor in Fla. Stat. § 921.141(6)(e),[6] not the domination prong:

> The third [mitigating] factor, the defendant acted under extreme duress or under the substantial domination of another person. There's two ways there can be substantial domination of another person or extreme duress, and I submit to you that when you look at the facts that you heard from all the doctors, the facts of the incident, what was building up in Mr. Glock, a mixture of Mr. Glock and Mr. Puiatti, mixed together—those two personalities and *I'm not saying that he was dominated or there was substantial domination [of] Mr. Glock. What I'm saying is that it's a mitigating circumstance and is applicable because he was under extreme duress based on the totality of the circumstances and some weight should be given to that mitigating factor for that purpose.*
>
> Glock's counsel also argued that Glock's criminal conduct was the result of circumstances unlikely to reoccur. Glock's counsel stated that "this whole thing was brought about to a great degree by the bad, destructive association between these two personalities. It's just something that occurred. It's wrong, it doesn't justify it, but it's not likely to occur again."

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[6] One statutory mitigating circumstance in Florida is that "[t]he defendant acted under extreme duress or under the substantial domination of another person." Fla. Stat. § 921.141(6)(e).

In closing, Puiatti's own counsel argued that neither Puiatti nor Glock would have committed the murder without the other:

> The family also said that Carl [Puiatti] was attracted to misfits and when asked a question by [the State] whether Carl was perhaps one of those himself, Mrs. Puiatti said she wouldn't deny that he had problems. Nonetheless, misfits, both of them misfits. This is a form of mitigation. Neither of them apparently—I didn't know about Mr. Glock until I came to this Courtroom, but neither of them apparently would have committed a violent act but for the other. And this factor is also a form of mitigation.

Puiatti's counsel referenced Dr. DelBeato's testimony that Puiatti showed a "flat affect"—that he felt strong emotions but did not show them outwardly—and that Dr. DelBeato and Dr. Meadows testified that Puiatti was being truthful and was remorseful. Puiatti's counsel then stated that "[t]his is more dependable than any display of emotion that Carl [Puiatti] might put on to you on the witness stand, although we know from the doctor's testimony that he's not capable of that kind of show."

Puiatti's counsel further argued that Puiatti was under an extreme emotional disturbance and extreme duress at the time of the murder. His counsel argued Puiatti was not "absolutely responsible because half of his brain is functioning in an impaired way and because of the extreme disturbance that he was under personally." Puiatti's counsel did not argue Puiatti was substantially dominated by Glock.

By an 11 to 1 vote, the jury recommended the death penalty for Puiatti. By an 11 to 1 vote, the jury

recommended the death penalty for Glock, who was executed in 2001.

G. 1984 Sentencing Hearing

On May 4, 1984, the state trial court held a joint sentencing hearing for Puiatti and Glock. Puiatti called three witnesses. Chuck Norman, Puiatti's first witness, was a volunteer who conducts weekly group discussions on alcoholism and drug abuse in the jail. Puiatti voluntarily attended every meeting except for one when he had the flu. Over the course of eight months, Norman noticed a "definite change" in Puiatti. Puiatti began to open up about his own history of drug and alcohol abuse, and doing so had an effect on the other inmates and on Norman himself.

Puiatti's other witnesses were Dr. DelBeato and Dr. Meadows. Both experts reiterated their penalty-phase testimony. For example, Dr. DelBeato again opined that Puiatti had right-brain dysfunction that was highly related to stress that Puiatti was under, with the "higher the stress, the lower his ability to behave correctly." Dr. Meadows testified about Puiatti's right-brain dysfunction, which he believed was likely caused by alcohol and drug use, and about Puiatti's psychological stressors at the time of the murder. Puiatti's counsel then argued.

Puiatti himself made this statement:

> I know I'm here this morning to be sentenced for the crime of first degree murder. A crime I am deeply ashamed of.
>
> Your Honor, as I've laid down to sleep each night these past eight months, there's one question above all others that makes me—to find it

difficult to fall asleep. And that question is, why didn't I keep driving away after I dropped Mrs. Richie off in the orange grove.

And to be perfectly honest with you, Your Honor, *I really don't know why I let myself be talked in to going back and shooting this woman.*

When I drove into the orange grove, the only thing I had on my mind was dropping her off somewhere, where it would take her a while to get to a phone or get to some people. So I could get away. Not killing her.

All I had to do was keep going like I was after I dropped her off, and she would still be alive today.

But as much as I truly wish I could, I cannot change that.

Your Honor, as I'm sure you can see from my P.S.I., it's not my nature to commit violent crimes, or to be violent and this sort of thing was totally out of character for me.

Another thing that was giving me much grief and sadness over these past eight months, is the way I have disgraced my family through what I've done.

....

I love and care for them very much, and pray that I never hurt them again.

(Emphasis added.) Puiatti recounted his progress with Alcoholics Anonymous and believed he could be rehabilitated in prison. Puiatti explained his remorse for the pain he had caused Ritchie's husband.

The state trial court sentenced Puiatti and Glock to death, stating:

> On the charge of murder in the first degree, it is the sentence of this Court that you each be put to death according to the law. And in reaching that sentencing judgment, I find three aggravating circumstances.
>
> First is that the capital felony was committed for the purpose of avoiding a lawful arrest, or effect escape from custody.
>
> And secondly, that it was committed for p[ec]uniary gain.
>
> And third, that this capital felony was a homicide and committed in a cold, calculated and premeditated manner, without any pretext of moral or legal justification.
>
> I find a mitigating factor for Mr. Glock, that he had no significant history of prior criminal activities.
>
> I find no mitigating factors for Mr. Puiatti.[7]

And in weighing this mitigating factor that I find for Mr. Glock, and the aggravating factors that I find, I'm convinced that the sentence of death is mandated by Florida law.

The state trial court sentenced Puiatti and Glock to life imprisonment for their robbery and kidnaping convictions.

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[7] Puiatti had two prior felony convictions, for burglary of a dwelling and for introduction of contraband into a county facility. In the penalty phase, the State did not introduce evidence of Puiatti's prior convictions because Puiatti agreed to waive any argument that the mitigating factor of no significant prior criminal history applied.

H. Direct Appeal

Puiatti appealed to the Florida Supreme Court, raising eight issues. *See Puiatti v. State*, 495 So.2d 128 (Fla.1986) ("*Puiatti I*"), *vacated and remanded by Puiatti v. Florida*, 481 U.S. 1027, 107 S.Ct. 1950, 95 L.Ed.2d 523 (1987). As to his motions to sever, Puiatti argued that the state trial court abused its discretion in refusing a severance because the joint trial prejudiced Puiatti. Puiatti argued that the prejudice accrued from three primary sources: (1) antagonistic post-arrest statements; (2) inconsistent and conflicting penalty phase defenses; and (3) penalty phase jury instructions and prosecutorial comments that were relevant to Glock's case but prejudicial error as to Puiatti.

The Florida Supreme Court affirmed Puiatti's convictions and death sentence. *Puiatti I*, 495 So.2d at 129. As to guilt-phase severance, the Florida Supreme Court held that Puiatti's constitutional right to confrontation under the Confrontation Clause and *Bruton*[8] was not violated by the introduction of Glock's individual confession implicating Puiatti because Puiatti also confessed, Puiatti's and Glock's individual confessions were interlocking, and their subsequent joint confession reconciled any minor differences in their individual confessions:

> We find that *Bruton* is not applicable under the facts of this cause, concluding that *Parker v. Randolph*, 442 U.S. 62, 99 S.Ct. 2132, 60 L.Ed.2d 713 (1979), controls this case. In *Parker*, the United States Supreme Court held that *Bruton* does not require reversal of a defendant's convic-

[8] *Bruton v United States*, 391 U S 123, 88 S Ct. 1620, 20 L Ed 2d 476 (1968)

tion *when the defendant himself has confessed and his confession "'interlocks' with and supports the confession of his codefendant." Id.* at 64, 99 S.Ct. at 2135. Confessions interlock when the salient facts against the first defendant that appear in the confession of the second defendant also appear in the confession of the first, and vice versa. *United States v. Kroesser*, 731 F.2d 1509, 1518 (11th Cir.1984); *Brownlee v. State*, 478 So.2d 467 (Fla. 4th DCA 1985); *Damon v. State*, 397 So.2d 1224 (Fla. 3d DCA 1981). These cases establish that interlocking confessions need not be identical statements; it is sufficient if the confessions are substantially consistent on the major elements of the crime involved.

In this case, Puiatti and Glock offered interlocking confessions. The initial individual confessions contained only slight inconsistencies, and each set forth sufficient evidence on the charged crimes to sustain the confessor's conviction. The fact that Glock's initial confession might have been exculpatory toward Puiatti concerning some details does not render its admission harmful when Puiatti's own confession clearly shows him guilty of the crime with which he is charged. Further, the subsequent joint confession, admitted without objection by Puiatti, reconciled the minor discrepancies of the individual confessions by Puiatti and Glock. We conclude that the trial court correctly denied Puiatti's motion for severance during the guilt phase of the trial. We emphasize that the inconsistencies between Puiatti's and Glock's initial confessions do not affect their guilt in the charged crimes since both admit they shot the victim. Each appellant is

> guilty of all the acts of the other in perpetrating the common criminal act.

Puiatti I, 495 So.2d at 130-31 (citations omitted) (emphasis added).

As to the penalty phase, the Florida Supreme Court determined severance was not required because the jury was able to consider Puiatti's penalty-phase evidence and apply the law without confusion or prejudice:

> We hold that a severance was not required in the penalty phase of the trial. As to the alleged conflict concerning which defendant dominated the other, our decision in *McCray* disposes of this contention. In *McCray* we stated:
>
> > [T]he fact that the defendant might have a better chance of acquittal or a strategic advantage if tried separately does not establish the right to a severance. Nor is hostility among defendants, or an attempt by one defendant to escape punishment by throwing the blame on a codefendant, a sufficient reason, by itself, to require severance. If the defendants engage in a swearing match as to who did what, the jury should resolve the conflicts and determine the truth of the matter.

416 So.2d at 806 (citations omitted). *See also Dean v. State*, 478 So.2d 38 (Fla.1985). Further, we find the mere fact that only one of two codefendants has a significant prior criminal history does not require, in and of itself, a severance in the trial's penalty phase. The critical question is whether the jury was able to consider evidence presented by each defendant during the penalty phase and apply the law without being unduly confused or prejudiced. We find that, under the circumstances of this case, the jury could

properly apply the facts to the law without confusion or prejudice.

Puiatti I, 495 So.2d at 131 (brackets in original).

Puiatti petitioned the United States Supreme Court for a writ of certiorari. In a one-paragraph opinion, the Supreme Court granted the petition, vacated the Florida Supreme Court's judgment, and remanded the case to the Florida Supreme Court for further consideration in light of the Supreme Court's Confrontation Clause decision in *Cruz v. New York*, 481 U.S. 186, 107 S.Ct. 1714, 95 L.Ed.2d 162 (1987). *See Puiatti v. Florida*, 481 U.S. 1027, 107 S.Ct. 1950, 95 L.Ed.2d 523 (1987). In *Cruz*, the Supreme Court concluded "that, where a nontestifying codefendant's confession incriminating the defendant is not directly admissible against the defendant, the Confrontation Clause bars its admission at their joint trial, even if the jury is instructed not to consider it against the defendant, and even if the defendant's own confession is admitted against him." 481 U.S. at 193, 107 S.Ct. at 1719 (citation omitted).[9] The *Cruz* Court stated,

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[9] The facts of *Cruz* are very different from that of Puiatti's case. Petitioner Cruz did not confess to police, and there was no joint confession as here. Rather, a non-testifying co-defendant gave a videotaped confession to police that incriminated Cruz. The trial court admitted the co-defendant's confession only against the co-defendant and instructed the jury not to consider it against Cruz. *Cruz*, 481 U.S. at 188-89, 107 S.Ct. at 1716-17.

At trial, a witness testified that Cruz had told him privately about the murder and that witness's testimony about Cruz's private confession "stood as the only evidence admissible against [Cruz] that directly linked him to the crime." *Id.* at 189, 107 S.Ct. at 1717. Further, Cruz was convicted of second-degree murder, not capital murder, and there was no penalty phase trial. *See id.* at 188-89, 107 S.Ct. at 1716-17; *People v. Cruz*, 66 N.Y.2d 61, 495 N.Y.S.2d 14, 485 N.E.2d 221 (1985).

however, that "the defendant's confession may be considered at trial in assessing whether his codefendant's statements are supported by sufficient 'indicia of reliability' to be directly admissible against [the defendant] (assuming the 'unavailability' of the codefendant) despite the lack of opportunity for cross-examination, and may be considered on appeal in assessing whether any Confrontation Clause violation was harmless." *Id.* at 193-94, 107 S.Ct. at 1719 (citations omitted).

On remand, the Florida Supreme Court affirmed Puiatti's convictions and death sentence. *Puiatti v. State*, 521 So.2d 1106, 1108 (Fla.1988) ("*Puiatti II*"). The Florida Supreme Court pointed out that *Cruz* did not concern a true joint confession by both defendants, that Glock and Puiatti's joint confession resolved any prior inconsistencies in their earlier individual confessions, and that Glock's individual and joint confession had the requisite indicia of reliability. *Id.* at 1107-08. The Florida Supreme Court reasoned:

> As we interpret *Cruz*, trial courts must recognize that a nontestifying codefendant's confession in a joint trial violates the confrontation clause except in those limited circumstances where indicia of reliability can be established. Once such a confession is introduced, the reviewing court must determine whether indicia of reliability exist or whether the introduction of a codefendant's confession meets the harmless error test.
>
> We fully recognize the Supreme Court's warning about the potential damning effects of a codefendant's confession on the incriminated defendant. However, we find that the facts in the instant case are clearly distinguishable from

> those in *Cruz* because Puiatti and Glock not only entered into separate interlocking confessions, but they also subsequently entered into a joint confession resolving all prior inconsistencies. Neither *Cruz* nor *Parker* concerned a true joint confession entered into by both defendants. The joint confession, as we explained in the majority opinion, is substantially consistent with the individual confessions of Glock and Puiatti. Further, the joint confession was so interlocking, we do not believe *Bruton* applies because reliability was clearly established, but, even if it was error, its use with Glock's name was harmless. We find the introduction of the individual confession of Glock to be harmless error under the circumstances of this case, and it falls squarely within the harmless error situation noted by Justice Blackmun when he stated: "I fully recognize that in most interlocking confession cases, any error in admitting the confession of a nontestifying codefendant will be harmless beyond a reasonable doubt." [*Parker v. Randolph*, 442 U.S.] at 79, 99 S.Ct. at 2142 (Blackmun, J., concurring in part and concurring in the judgment).

Puiatti II, 521 So.2d at 1107-08. The Florida Supreme Court concluded that "the introduction of the individual interlocking confession of Glock and the joint confession was harmless error, even if it was error." *Id.* at 1107.

Puiatti again petitioned for a writ of certiorari. The United States Supreme Court denied Puiatti's petition. *Puiatti v. Florida*, 488 U.S. 871, 109 S.Ct. 184, 102 L.Ed.2d 153 (1988).

I. State Postconviction Proceedings

In 1990, Puiatti filed a Florida Rule of Criminal Procedure 3.850 motion to vacate his convictions and death sentence, which was denied. Puiatti's Rule 3.850 motion raised five claims, including ineffective trial counsel in the guilt and penalty phases.

Puiatti appealed the denial of his 3.850 motion to the Florida Supreme Court and simultaneously filed a state habeas petition in the Florida Supreme Court. Puiatti's state habeas petition asserted he had ineffective appellate counsel who failed to argue the joint trial violated Puiatti's constitutional right to an individualized sentencing.[10]

The Florida Supreme Court affirmed the denial of Puiatti's 3.850 motion and denied his state habeas petition. *Puiatti v. Dugger*, 589 So.2d 231, 232 (Fla.1991) ("*Puiatti III*"). The Florida Supreme Court concluded that Puiatti had not shown his appellate counsel rendered constitutionally deficient performance. *Puiatti III*, 589 So.2d at 235.

J. District Court Proceedings

In 1992, Puiatti filed a 28 U.S.C. § 2254 petition for a writ of habeas corpus, challenging his convictions and death sentence. Several times, Puiatti's case was

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[10] Puiatti's individualized sentencing claim-that he alleged his appellate counsel should have raised-was grounded in the Sixth, Eighth, and Fourteenth Amendments, as well as the United States Supreme Court's decision in *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978).

Puiatti's state habeas petition also claimed that Puiatti's rights were violated by the State's introduction of victim-impact and victim-character evidence at trial, and by the Florida Supreme Court's consolidated treatment of Puiatti's and Glock's claims on direct appeal.

administratively stayed pending the outcome of other state or federal proceedings. On August 14, 2009, the district court denied Puiatti's § 2254 claims as to his convictions but vacated his death sentence. *Puiatti v. Sec'y, Dep't of Corr.*, 651 F.Supp.2d 1286 (M.D.Fla. 2009) ("*Puiatti IV*"). The district court concluded that the state trial court's refusal to sever the penalty phase violated Puiatti's Eighth and Fourteenth Amendment right to an "individualized sentencing determination." The district court did not decide Puiatti's other challenges to the penalty phase, but held they were moot.[11] *Id.* at 1304. The State moved the district court to alter or amend its order vacating Puiatti's death sentence. The State argued that the district court's failure to resolve Puiatti's remaining penalty-phase issues violated this Court's directive in *Clisby v. Jones*, 960 F.2d 925 (11th Cir.1992) (*en banc*), that district courts "resolve all claims for relief raised in a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 ..., regardless whether habeas relief is granted or denied." *Id.* at 936. The district court denied the State's motion.

The State appealed the district court's vacatur of Puiatti's death sentence and denial of the motion to alter or amend.[12] Before discussing the State's

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[11] The district court did not address these penalty-phase claims: (1) ineffective trial counsel; (2) the prosecutor's allegedly inflammatory arguments; (3) the state trial court's refusal to find certain mitigating circumstances; and (4) the state trial court's refusal to provide certain jury instructions on aggravating circumstances. *Puiatti IV*, 651 F.Supp.2d at 1296-97, 1304.

[12] Both the district court and this Court denied Puiatti a certificate of appealability to cross-appeal the denial of his claims challenging his convictions. *Puiatti IV*, 651 F.Supp 2d at 1319-20; *Puiatti v. McNeil*, No. 09-15514 (11th Cir. Jun. 6, 2010)

appeal, we review briefly the events in co-defendant Glock's appeals.

K. Glock's Appeals and Postconviction Proceedings

As Puiatti was pursuing his appeals and postconviction proceedings, his co-defendant Glock was doing the same. On direct appeal, the Florida Supreme Court consolidated Glock's appeal with Puiatti's. Glock claimed, among other things, that the state trial court erred in refusing to sever Puiatti's and Glock's penalty phase trial. The Florida Supreme Court denied Glock's claims challenging his death sentence—including his penalty-phase severance claims-for the same reasons it denied Puiatti's. *Puiatti I*, 495 So.2d at 132.

Glock filed a Rule 3.850 motion for postconviction relief, which the Florida trial court denied in 1988. Glock appealed to the Florida Supreme Court and filed in the Florida Supreme Court a petition for a writ of habeas corpus. The Florida Supreme Court affirmed the denial of Glock's Rule 3.850 motion and denied his state habeas petition. *Glock v. Dugger*, 537 So.2d 99 (Fla.1989) ("*Glock I*").

In 1989, Glock filed a § 2254 petition in district court. Glock's petition claimed, *inter alia*, that the state trial court erred by not granting Glock a severance at the guilt and penalty phases. The district court denied Glock's § 2254 petition. *Glock v. Dugger*, 752 F.Supp. 1027 (M.D.Fla.1990) ("*Glock II*"). In doing so, the district court concluded that Glock's Confrontation Clause rights were not violated by admission of Puiatti's individual confession and the

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(order denying Appellee/Cross-Appellant Puiatti's application for certificate of appealability) (unpublished).

joint confession, and the state trial court did not err in denying Glock's motions to sever. *Id.* at 1029-31.[13]

In 1994, a panel of this Court affirmed in part and reversed in part. *Glock v. Singletary*, 36 F.3d 1014 (11th Cir.1994) ("*Glock III*"). This *Glock III* decision was vacated on April 19, 1995. *Glock v. Singletary*, 51 F.3d 942 (11th Cir.1995) (*en banc*). This Court *en banc* concluded that (1) Glock was not entitled to relief on his Confrontation Clause claim on the merits, and (2) the non-retroactivity principle of *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) precluded relief on Glock's HAC jury instruction claim. *Glock v. Singletary*, 65 F.3d 878, 880 (11th Cir.1995) (*en banc*) ("*Glock IV*"). The *en banc* Court remanded the case to the panel to consider Glock's remaining challenges to his death sentence. *Id.*

On remand, the *Glock* panel considered those claims, which included Glock's claim "that his [death] sentence should be set aside because ... the [state] trial court refused to sever [Glock's] sentencing proceeding from his co-defendant's, thereby depriving him of individualized sentencing." *Glock v. Singletary*, 84 F.3d 385, 385 (11th Cir.1996) ("*Glock V*"). The *Glock V* panel summarily affirmed the district court's denial of Glock's penalty-phase severance claim, stating, "We find no merit in [this] ... claim[ ] and therefore affirm the district court's denial of relief thereon." *Id.* at 386. But the *Glock V* panel remanded the case to the district court for an evidentiary hearing on Glock's ineffective trial counsel claim. *Id.* The United States Supreme Court denied Glock's peti-

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[13] Glock's and Puiatti's separate § 2254 petitions were ruled on by the same district court judge.

tions for certiorari. *Glock v. Singletary*, 519 U.S. 888, 117 S.Ct. 225, 136 L.Ed.2d 157 (1996); *Glock v. Singletary*, 519 U.S. 1044, 117 S.Ct. 616, 136 L.Ed.2d 540 (1996).

The district court conducted an evidentiary hearing on Glock's ineffective assistance claim and again denied the claim. This Court affirmed. *Glock v. Moore*, 195 F.3d 625 (11th Cir.1999) ("*Glock VI*"). The United States Supreme Court denied Glock's certiorari petition. *Glock v. Moore*, 531 U.S. 890, 121 S.Ct. 213, 148 L.Ed.2d 150 (2000).

After the Florida governor signed Glock's death warrant, Glock filed a successive Rule 3.850 motion, which was denied in 2000. Glock appealed and filed a successive state habeas petition in the Florida Supreme Court. The Florida Supreme Court affirmed the denial of Glock's successive 3.850 motion and denied Glock's successive habeas petition. *Glock v. Moore*, 776 So.2d 243 (Fla.2001) ("*Glock VII*"). The United States Supreme Court denied Glock's certiorari petition and his application for a stay of execution. *Glock v. Florida*, 531 U.S. 1107, 121 S.Ct. 848, 148 L.Ed.2d 733. Glock was executed in 2001.

II. STANDARD OF REVIEW

Because Puiatti filed his § 2254 petition before the April 24, 1996 effective date of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), we review his claims under pre-AEDPA law. *Turner v. Crosby*, 339 F.3d 1247, 1273 (11th Cir.2003). "Pre-AEDPA, questions of law and mixed questions of law and fact resolved by state habeas courts are reviewed *de novo*, while the state courts' factual findings are subject to [a] presumption of correctness." *Jefferson v. Hall*, 570 F.3d 1283, 1300 (11th Cir.2009), *vacated and re-*

manded on other grounds sub nom. Jefferson v. Upton, ---U.S. ----, 130 S.Ct. 2217, 176 L.Ed.2d 1032 (2010) (quotation marks omitted). We review *de novo* the district court's grant of Puiatti's § 2254 petition. *Turner*, 339 F.3d at 1273. Any factual findings made by the district court are reviewed for clear error, but its legal conclusions and mixed questions of law and fact are reviewed *de novo*. *Id.*

III. *CLISBY* ERROR

In *Clisby v. Jones*, 960 F.2d 925, 936 (11th Cir. 1992) (*en banc*), this Court, exercising its supervisory power over the district courts in this circuit, instructed them "to resolve all claims for relief raised in a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 ..., regardless [of] whether habeas relief is granted or denied." Here, the district court expressly declined to reach the merits of Puiatti's penalty-phase claims other than his severance claim. The district court attempted to distinguish *Clisby* by reasoning that (1) the district court did not "'reserve' judgment" on Puiatti's other penalty-phase claims, as the district court had in *Clisby*, but "actually rendered [them] moot"; and (2) the district court in *Clisby* already had held an evidentiary hearing, but here the district court had not, and so *Clisby*'s judicial economy concerns were supported by declining to reach the merits of Puiatti's penalty-phase claims.

The district court's reasoning and its resulting decision are contrary to the dictates of *Clisby*. *Clisby*'s instruction to district courts was clear and contained no limitation or exception based on why a district court left some claims unresolved. In fact, in two of the five published decisions cited by the *Clisby* Court as examples of "the growing number of cases in which we are forced to remand for consideration of issues

the district court chose not to resolve," the unresolved claims were mooted by the district court's grant of the writ as to one or more claims. *See Clisby*, 960 F.2d at 935-36 (citing, *inter alia, Wilson v. Kemp*, 777 F.2d 621 (11th Cir.1985); *Blake v. Kemp*, 758 F.2d 523 (11th Cir.1985)); *Wilson*, 777 F.2d at 622 (district court denied all claims as to guilt phase, granted habeas relief as to sentence based on prosecutorial-comment claim, and declined to reach other claims as to sentencing phase); *Blake v. Zant*, 737 F.2d 925, 926 (11th Cir.1984) (district court granted writ based on claims of ineffective assistance at guilt and penalty phases and did not decide other claims), *opinion vacated by Blake v. Kemp*, 758 F.2d at 523.

Further, *Clisby*'s instruction to district courts does not turn on whether an evidentiary hearing may be required. Instead, *Clisby* focused on concerns of "piecemeal litigation," the "important interests of comity and finality implicated in federal habeas review of state convictions and sentences," and "the disruptive effect federal habeas review has on a state's criminal justice system" until all federal habeas claims are resolved. *Clisby*, 960 F.2d at 935. Such policy considerations "clearly favor the contemporaneous consideration of allegations of constitutional violations grounded in the same factual basis," *id.* at 936, and that is true regardless of whether an evidentiary hearing in district court may be required on some, but not all, claims.

Thus, the district court erred in refusing to address the merits of all of Puiatti's claims. Nevertheless, in the interest of avoiding further delay in a case that has already lingered far too long (Puiatti filed his federal habeas petition over eighteen years ago), we elect to address the State's appeal on the penalty-

phase severance claim rather than vacate the district court's judgment without prejudice and remand for full resolution.[14]

IV. PENALTY-PHASE SEVERANCE CLAIM

Puiatti does not contend that joint penalty phases in capital cases are prohibited or are always *per se* unconstitutional. Rather, Puiatti argues that, under the particular circumstances of his capital case, the state trial court's denial of his severance motion violated his Eighth and Fourteenth Amendment right to an individualized sentencing determination.[15] Although Puiatti's argument intertwines severance and individualized sentencing, we explain why these are separate and different concepts. We start with

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[14] The State argues that the district court abused its discretion in determining that an evidentiary hearing was warranted on Puiatti's remaining penalty-phase claims. We agree with Puiatti that the district court never actually decided this issue. Rather, at most the district court merely assumed that an evidentiary hearing may be needed if it were to reach Puiatti's remaining penalty-phase claims. In fact, the district court expressly stated that if this Court were to reverse the district court's grant of habeas relief as to Puiatti's penalty-phase severance claim, the district court on remand "would have to resolve Puiatti's claim that he is entitled to an evidentiary hearing."

We also decline the State's invitation to pass upon the propriety of an evidentiary hearing in the first instance. Of course, we point out that Puiatti, having successfully argued that the district court has not yet decided his entitlement to an evidentiary hearing, may not take a contrary position on remand.

[15] The State argues that Puiatti failed to exhaust this claim in state court and thus is procedurally barred from raising it in federal court. Puiatti claims he adequately raised this claim on direct appeal and the Florida Supreme Court denied it. We assume for purposes of this opinion only that Puiatti exhausted this claim because it lacks merit in any event.

established federal principles about joinder and severance, next review Puiatti's constitutional right to an individualized sentencing determination, and then analyze Puiatti's claims about his joint penalty trial. Joinder and severance first.[16]

A. Joinder and Severance

"Joint trials play a vital role in the criminal justice system." *Zafiro v. United States*, 506 U.S. 534, 537, 113 S.Ct. 933, 937, 122 L.Ed.2d 317 (1993) (quotation marks omitted); *Richardson v. Marsh*, 481 U.S. 200, 209, 107 S.Ct. 1702, 1708, 95 L.Ed.2d 176 (1987). The general rule or preference is that defendants indicted together should be tried together. *Zafiro*, 506 U.S. at 537-38, 113 S.Ct. at 937; *United States v. Baker*, 432 F.3d 1189, 1236 (11th Cir.2005). "Joint trials generally serve the interests of justice by avoiding inconsistent verdicts and enabling more accurate assessment of relative culpability-advantages which sometimes operate to the defendant's benefit." *Richardson*,

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[16] In this § 2254 proceeding, we examine only federal law and not whether Puiatti was entitled to severance under state law The Florida Supreme Court already held a severance was not required in the penalty phase of Puiatti's trial under Florida law. *Puiatti I*, 495 So.2d at 131. Further, in § 2254 cases, petitioners may raise only federal rights *See McCullough v Singletary*, 967 F.2d 530, 535 (11th Cir.1992) (noting that "[a] federal habeas petition may be entertained only on the ground that a petitioner is in custody in violation of the Constitution or laws or treaties of the United States," and thus "[a] state's interpretation of its own laws or rules provides no basis for federal habeas corpus relief, since no question of a constitutional nature is involved") We discuss joinder and severance principles only because Puiatti makes what he calls a "severance constitutional claim," namely that denial of his severance motion deprived him of his constitutional right to an individualized sentencing determination

481 U.S. at 210, 107 S.Ct. at 1708-09. The Supreme Court has admonished that "[i]t would impair both the efficiency and the fairness of the criminal justice system to require ... that prosecutors bring separate proceedings, presenting the same evidence again and again, requiring victims and witnesses to repeat the inconvenience (and sometimes trauma) of testifying, and randomly favoring the last-tried defendants who have the advantage of knowing the prosecution's case beforehand." *Id.* Joint trials have long been a common and preferred procedure in both federal and state courts.

Although these Supreme Court cases involve the guilt or innocence issue, the same considerations—serving justice, avoiding inconsistent verdicts, enabling more accurate assessments of relative culpability, fairness, and efficiency—that militate in favor of joinder of co-defendants' trials in the guilt phase also favor joint penalty trials. *See United States v. Tipton*, 90 F.3d 861, 892 (4th Cir.1996). Accordingly, co-defendants charged with capital murder have been jointly tried not only in Florida but also under federal statutes for both the guilt and penalty phases. *See United States v. Bernard*, 299 F.3d 467, 475 (5th Cir.2002); *United States v. Causey*, 185 F.3d 407 (5th Cir.1999); *Tipton*, 90 F.3d 861.[17]

Nonetheless, trial courts have discretion to grant a severance if a defendant carries his burden to show both that (1) a joint trial would actually prejudice the defendant *and* (2) a severance is the proper remedy for the prejudice, rather than jury instructions or

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[17] In Florida, as in federal court, the same jury that hears the guilt phase hears the penalty phase. *See Maxwell v. Wainwright*, 490 So.2d 927, 933 (Fla.1986)

another remedy. *Zafiro*, 506 U.S. at 539-41, 113 S.Ct. at 938-39; *United States v. Browne*, 505 F.3d 1229, 1268-69 (11th Cir.2007); *see also United States v. Blankenship*, 382 F.3d 1110, 1122 (11th Cir.2004) (noting that in *Zafiro*, "the Supreme Court set down a two-step test for determining whether a defendant is entitled to a new trial due to a district court's refusal to sever").[18]

As to the first *Zafiro* step, a defendant "must carry the heavy burden of demonstrating the lack of a fair trial due to actual, compelling prejudice." *United States v. Chavez*, 584 F.3d 1354, 1360 (11th Cir. 2009), *cert. denied*, --- U.S. ----, 131 S.Ct. 436, 178 L.Ed.2d 338, 79 U.S.L.W. 3245, 2010 WL 3646192 (2010); *see United States v. Gari*, 572 F.3d 1352, 1365 (11th Cir.2009) ("We will not reverse the denial of a severance motion absent a clear abuse of discretion resulting in compelling prejudice against which the district court could offer no protection." (quoting *United States v. Walser*, 3 F.3d 380, 385 (11th Cir.1993))), *cert. denied*, --- U.S. ----, 130 S.Ct. 1562, 176 L.Ed.2d 146 (2010); *United States v. Novaton*, 271 F.3d 968, 989 (11th Cir.2001) (stating a defendant must discharge the "'heavy burden' of demonstrating 'compelling prejudice' from the denial of a motion to sever" (quoting *United States v. Pepe*, 747 F.2d 632, 650-51 (11th Cir.1984))). In *Zafiro*, the Supreme Court explained that "[m]utually antagonistic defenses are not prejudicial *per se*."[19] *Zafiro*, 506

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[18] Our discussion does not focus on the text of any state or federal rule about joinder or severance because the question here is only whether the state courts' denial of severance violated the federal Constitution.

[19] In *Zafiro*, the Supreme Court surveyed circuit court decisions and observed that "the courts have reversed relatively few

U.S. at 538, 113 S.Ct. at 938; *see Blankenship*, 382 F.3d at 1122 (stating *Zafiro* "specifically rejected the notion that defendants who have contradictory defenses are inherently prejudiced"). And "it is well settled that defendants are not entitled to severance merely because they may have a better chance of acquittal in separate trials." *Zafiro*, 506 U.S. at 540, 113 S.Ct. at 938.

As to the second *Zafiro* step, severance is not automatically required even if prejudice is shown. *Zafiro*, 506 U.S. at 539-40, 113 S.Ct. at 938. A court's limiting instruction to the jury will often cure any prejudice resulting from a joint trial. *Zafiro*, 506 U.S. at 539, 113 S.Ct. at 938. *Zafiro* teaches that a district court should grant severance "only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *Id.* Under *Zafiro*, there are only two circumstances in which severance is mandatory: where there is a serious risk that a joint trial (1) "would compromise a specific trial right of one of the defendants," or (2) would "prevent the jury from making a reliable judgment about guilt or innocence." *United States v. Thompson*, 422 F.3d 1285, 1292 (11th Cir.2005) (quoting *Zafiro*, 506 U.S. at 539, 113 S.Ct. at 938); *Browne*, 505 F.3d at 1269; *Blankenship*, 382 F.3d at 1122-23.[20] "Aside from the two categories

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convictions for failure to grant a severance on grounds of mutually antagonistic or irreconcilable defenses." 506 U.S. at 538, 113 S.Ct. at 937.

[20] In *Blankenship*, this Court said the first scenario for "mandatory severance" described by the Supreme Court in *Zafiro* "exists only where a joint trial leads to the denial of a constitutional right." 382 F.3d at 1123. We also observed that "[r]egard-

of defendants specified by the Supreme Court, most other defendants prejudiced by a joint trial are entitled only to curative instructions." *Blankenship*, 382 F.3d at 1123 (discussing "the two-step test" in *Zafiro*).

The decision whether to grant a severance lies within the trial court's sound or substantial discretion. *Zafiro*, 506 U.S. at 538-39, 113 S.Ct. at 938; *Chavez*, 584 F.3d at 1360 ("We will not reverse the denial of a severance motion in the absence of a clear abuse of discretion."); *United States v. Ramirez*, 426 F.3d 1344, 1352 (11th Cir.2005) ("We will not reverse the denial of a severance motion absent a clear abuse of discretion resulting in compelling prejudice against which the district court could offer no protection." (quoting *Walser*, 3 F.3d at 385)). Appellate courts are generally reluctant to second-guess a trial court's decision on severance. *United States v. Baker*, 432 F.3d 1189, 1236 (11th Cir.2005); *Ramirez*, 426 F.3d at 1352; *United States v. Novaton*, 271 F.3d at 989.

Before analyzing Puiatti's claims about his joint trial, we review the Supreme Court decisions establishing his constitutional right to an individualized sentencing determination because Puiatti tries to link severance with that right.

B. Puiatti's Constitutional Right to an Individualized Sentencing Determination

We start with *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), where the Su-

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ing the second scenario mentioned by *Zafiro*, the Court did not clearly explain what it meant by a jury being prevented from 'making a reliable judgment.'" *Id.* We then discussed potential situations where the "reliable judgment" exception might apply *Id.* at 1123-25

preme Court vacated a death sentence because the Ohio statute narrowly limited *the type* of mitigating factors the sentencer could consider.[21] A Supreme Court plurality discussed "the concept of individualized sentencing," stressing "[t]he need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual." *Id.* at 602, 605, 98 S.Ct. at 2963, 2965. The Supreme Court plurality noted the "historical repudiation" of mandatory death sentences for certain crimes, and how "the imposition of death by public authority is so profoundly different from all other penalties." *Id.* at 604-05, 98 S.Ct. at 2964-65. The Supreme Court plurality concluded that in capital cases, "the fundamental respect for humanity underlying the Eighth Amendment ... requires consideration of the character and record of *the individual* offender and the circumstances of the particular offense as a constitutionally

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[21] The *Lockett* Court described the Ohio statute.

> Once a verdict of aggravated murder with specifications had been returned, the Ohio death penalty statute required the trial judge to impose a death sentence unless, after "considering the nature and circumstances of the offense" and Lockett's "history, character, and condition," he found by a preponderance of the evidence that (1) the victim had induced or facilitated the offense, (2) it was unlikely that Lockett would have committed the offense but for the fact that she "was under duress, coercion, or strong provocation," or (3) the offense was "primarily the product of [Lockett's] psychosis or mental deficiency."

Lockett, 438 U.S. at 593-94, 98 S.Ct. at 2959. Lockett argued her death sentence was invalid because the statute did not permit the sentencing judge to consider, as mitigation, evidence of Lockett's "character, prior record, age, lack of specific intent to cause death, and her relatively minor part in the crime." *Id.* at 597, 98 S.Ct. at 2961.

indispensable part of the process of inflicting the penalty of death." *Id.* at 604, 98 S.Ct. at 2964 (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976) (plurality opinion)) (emphasis added). The Supreme Court plurality "conclude[d] that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.* at 604, 98 S.Ct. at 2964-65 (emphasis omitted). "To meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors." *Id.* at 608, 98 S.Ct. at 2967. The Supreme Court held the Ohio statute invalid because it permitted consideration of only three mitigating factors.[22] *Id.*

A few years later, a Supreme Court majority followed *Lockett* in *Eddings v. Oklahoma*, where a capital defendant presented mitigating evidence about his troubled childhood and emotional disorders, but the Oklahoma courts ruled that the sentencer could not consider that mitigating evidence. 455 U.S. 104, 105-10, 102 S.Ct. 869, 872-74, 71 L.Ed.2d 1 (1982).[23] The Oklahoma statute provided that "evidence may be presented [in sentencing] as to any mitigating

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[22] Lockett participated in the murder with three other persons, was tried separately, and thus had no severance issue. *See Lockett*, 438 U.S. at 591, 98 S.Ct. at 2958.

[23] Eddings pled nolo contendere to the murder charge and had only a penalty phase hearing. *Eddings*, 455 U.S. at 106, 102 S.Ct. at 872. Eddings had no co-defendants and thus no severance issue.

circumstances or as to any of the aggravating circumstances enumerated in this act." *Id.* at 106, 102 S.Ct. at 872. The sentencing judge, however, stated he could not "consider the fact of this young man's violent background." *Id.* at 109, 102 S.Ct. at 873. The Oklahoma appellate court affirmed, effectively excluding family history as a factor excusing or mitigating the capital defendant's behavior. *See id.* at 109-10, 102 S.Ct. at 874 (citing *Eddings v. State*, 616 P.2d 1159, 1170 (Okla.Crim.App.1980)).

The Supreme Court in *Eddings* found "that the limitations placed by these [Oklahoma] courts upon the mitigating evidence they would consider violated the rule in *Lockett*." *Id.* at 113, 102 S.Ct. at 876. The *Eddings* Court described *Lockett* as "the product of considerable history reflecting the law's effort to develop a system of capital punishment at once consistent and principled but also humane and sensible *to the uniqueness of the individual*." *Id.* at 110, 102 S.Ct. at 874 (emphasis added). The *Eddings* Court reasoned that "[j]ust as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence." *Id.* at 113-14, 102 S.Ct. at 876-77. Further, the sentencer "may determine the weight to be given relevant mitigating evidence," but "may not give it no weight by excluding such evidence from their consideration." *Id.* at 114-15, 102 S.Ct. at 877.

Next came the capital sentencing case of *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), *overruled on other grounds by Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), where the Supreme Court vacated Penry's death sentence, stating, "To provide the individua-

lized sentencing determination required by the Eighth Amendment, ... the sentencer must be allowed to consider mitigating evidence." 492 U.S. at 316, 109 S.Ct. at 2945. Texas's statute directed that the jury would decide Penry's sentence by answering three questions, called "special issues."[24] The Supreme Court previously had upheld that statute, concluding that "the special issues would be interpreted broadly enough to permit the sentencer to consider all of the relevant mitigating evidence a defendant might present in imposing sentence." *Id.* at 315, 109 S.Ct. at 2945. Although Penry presented mitigating evidence of mental retardation, organic brain damage, and a childhood of deprivation and physical abuse, the jury was given only the three questions and was never instructed that it could consider and give effect to Penry's mitigating evidence in imposing sentence.[25] *Id.* at 320, 322, 109 S.Ct. at 2947-48. The *Penry* Court

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[24] Penry would receive life imprisonment unless the jury unanimously answered "yes" to all three: (1) whether Penry's conduct "was committed deliberately and with the reasonable expectation that the death of the deceased or another would result"; (2) whether it was probable that Penry "would commit criminal acts of violence that would constitute a continuing threat to society", and (3) whether Penry's conduct "was unreasonable in response to the provocation, if any, by the deceased." *Penry*, 492 U.S. at 310, 109 S.Ct. at 2942. The jury answered yes to all three special issues. *Id.* at 311, 109 S.Ct. at 2943.

[25] The Texas trial court denied Penry's motion to instruct the jury that (1) it was authorized to issue "a discretionary grant of mercy based upon the existence of mitigating circumstances", (2) it "may take into consideration all of the evidence whether aggravating or mitigating in nature which was submitted in the full trial of the case", and (3) the State had to "show beyond a reasonable doubt that any aggravating circumstances found to exist outweigh any mitigating circumstances" before the death penalty could be imposed. *Id.* at 310-11, 109 S.Ct. at 2942.

stressed that "[u]nderlying *Lockett* and *Eddings* is the principle that punishment should be directly related to the personal culpability of the criminal defendant." *Id.* at 319, 109 S.Ct. at 2947. In *Lockett*, *Eddings*, and *Penry*, "the constitutional defect lay in the fact that relevant mitigating evidence was placed beyond the effective reach of the sentencer." *Johnson v. Texas*, 509 U.S. 350, 366, 113 S.Ct. 2658, 2668, 125 L.Ed.2d 290 (1993) (quoting *Graham v. Collins*, 506 U.S. 461, 475, 113 S.Ct. 892, 902, 122 L.Ed.2d 260 (1993)).

Recently, the Supreme Court again examined a Texas death penalty statute in *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 127 S.Ct. 1654, 167 L.Ed.2d 585 (2007).[26] The trial court instructed the jury to decide only two special issues: (1) whether the defendant's conduct that caused the victim's death was "committed deliberately and with the reasonable expectation that the death of the deceased or another would result"; and (2) whether there was "a probability that the defendant ... would commit criminal acts of violence that would constitute a continuing threat to society." *Id.* at 238, 127 S.Ct. at 1660. The Texas statute mandated a death sentence if the jury

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[26] The Texas statute then in effect "instruct[ed] the jury to decide '[w]hether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed.'" *Abdul-Kabir*, 550 U.S. at 238 n. 2, 127 S.Ct. at 1660 n. 2 (quoting Tex.Code Crim. Proc. Ann., Art. 37.071, § 2(e)(1) (Vernon 2006)) (second alteration in original).

answered yes to both special issues.[27] *Id.* at 239, 127 S.Ct. at 1660.

Abdul-Kabir presented mitigating evidence from his mother, aunt, and mental health experts. *Id.* at 239-40, 127 S.Ct. at 1660-61. The trial court refused Abdul-Kabir's requested jury instructions that would have authorized a negative answer to either of the special issues based on mitigation evidence. *Id.* at 242, 127 S.Ct. at 1662. The jury answered "yes" to both special issues, and Abdul-Kabir was sentenced to death. *Id.*

The Supreme Court observed that the sentencing process is "fatally flawed" when "the jury is not permitted to give meaningful effect or a 'reasoned moral response' to a defendant's mitigating evidence-because it is forbidden from doing so by statute or a judicial interpretation of a statute." *Id.* at 264, 127 S.Ct. at 1675. Abdul-Kabir's mitigating evidence had relevance to his moral culpability beyond the scope of the two special questions in the Texas statute, and the denial of his requested instructions "provided the jury with no vehicle for expressing its 'reasoned moral response' to that evidence." *Id.* at 252-53, 256-57, 127 S.Ct. at 1668, 1670 (quoting *Franklin v. Lynaugh*, 487 U.S. 164, 185, 108 S.Ct. 2320, 2333, 101 L.Ed.2d 155 (1988) (O'Connor, J., concurring)). "[S]entencing juries must be able to give meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the

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[27] Although Abdul-Kabir committed the capital murder with two other persons, the opinion does not mention whether he was tried together with the others or if Abdul-Kabir was tried alone There was no severance issue raised in *Abdul-Kabir*

death penalty on a particular individual." *Id.* at 246, 127 S.Ct. at 1664.

In summary, *Lockett* and its progeny establish that Puiatti has a constitutional right under the Eighth and Fourteenth Amendments not only (1) to present any relevant mitigating evidence as to his unique, individual background, character, and record and the circumstances of his crime, but also (2) to have the sentencing jury or judge give meaningful consideration and effect to his mitigation evidence without such restrictions by state statute, judicial interpretation, or jury instructions.[28] *Abdul-Kabir*, 550 U.S. at 264-65, 127 S.Ct. at 1675; *Eddings*, 455 U.S. at 112-15, 102 S.Ct. at 875-77; *Lockett*, 438 U.S. at 604-05, 98 S.Ct. at 2964-65.

The core substantive ingredient in the constitutional right to an "individualized sentencing" is mitigation evidence relevant to the capital defendant as an individual or unique person (whether his background, character, mental health record, or circumstances of his crime), which a jury may consider to assess personal moral culpability and to determine an individualized sentence. None of these Supreme Court cases mentions joinder or severance. The constitutional right involved is not based on, or tied to, a separate trial. Rather, the constitutional right stems from the need for a presentation of, and consideration of, mitigation evidence relevant to the defendant as a

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[28] The lesson of *Lockett* and its progeny is that "[t]he Constitution requires that the sentencer be allowed to consider and give effect to evidence offered in mitigation, but it does not dictate the effect that must be given once the evidence is considered; it does not require the sentencer to conclude that a particular fact is mitigating or to give it any particular weight." *Schwab v. Crosby*, 451 F.3d 1308, 1329 (11th Cir.2006).

unique individual. With this background, we turn to Puiatti's claims about his joint trial.

C. Puiatti's Claims on Appeal

As noted earlier, Puiatti claims that the trial court's denial of his severance motion (and resulting joint trial) violated his constitutional right to an individualized sentencing determination. For numerous reasons, Puiatti's claim wholly fails.

First, Puiatti was not prevented from presenting any mitigating evidence. Puiatti has not proffered a single piece of evidence he was unable to put before the jury or judge for consideration by virtue of the joint penalty phase.

Second, no state statute nor judicial interpretation nor jury instruction restricted the jury or judge from considering, or acting upon, Puiatti's mitigation evidence. Rather, the Florida trial court appropriately instructed the jury during the penalty phase to carefully weigh and consider "all of" the evidence presented, stating, "Before you ballot you should carefully weigh, sift and consider the evidence, and all of it, realizing that human life is at stake, and you should bring to bear your best judgment in reaching your advisory sentence."

The state trial court also instructed the jury about the potential sentences for Glock and Puiatti separately and individually.[29] "Jurors routinely serve as

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[29] The state trial court instructed the jury, in pertinent part:

> Now, if a majority of the jury determine[s] that Robert Glock, II, should be sentenced to death, your advisory sentence will be a majority of the jury, by a vote of-and a number, whatever number voted so voted advise and recommend to the Court that it impose the death penalty upon Robert D. Glock, II.

impartial factfinders in cases that involve sensitive, even life-and-death matters" and "[i]n those cases, as in all cases, juries are presumed to follow the court's instructions." *Hammond v. Hall*, 586 F.3d 1289, 1334 (11th Cir.2009) (quoting *CSX Transp., Inc. v. Hensley*, --- U.S. ----, 129 S.Ct. 2139, 2141, 173 L.Ed.2d 1184 (2009)). Courts presume that the jury heard, understood, and followed the court's instruc tions. *Richardson*, 481 U.S. at 208-11, 107 S.Ct. at 1708-09.

Third, although Puiatti attempts to connect and intertwine severance with his constitutional right to an individualized sentencing determination, we can locate, and Puiatti has cited, no Supreme Court decision doing so. *Lockett* and its progeny do not address joint penalty phases or say that the presence of a co-defendant at a capital defendant's penalty phase trial has any Eighth Amendment implications whatsoever. None of the *Lockett* line of cases relates

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If a majority of the jury determine[s] that Carl Puiatti should be sentenced to death, your advisory sentence will be a majority of the jury, by a vote of-and indicate whatever that vote is, advise and recommend to the Court that it impose the death penalty upon Carl Puiatti.

On the other hand, if by six or more votes, the jury determines that Robert D. Glock, II, should not be sentenced to death, your advisory sentence will be the jury advises and recommends to the Court that it impose a sentence of life imprisonment upon Robert D. Glock, II, without possibility of parole for twenty-five years.

And if by six or more votes the jury determines that Carl Puiatti should not be sentenced to death, your advisory sentence will be the jury advises and recommends to the Court that it impose a sentence of life imprisonment upon Carl Puiatti without possibility of parole for twenty-five years.

to severance or helps Puiatti's claim at all. Puiatti, like the district court, cites no precedent that suggests a joint penalty trial is improper for co-defendants who were properly joined in the guilt phase. The Supreme Court has never intimated, much less held, that the special concerns in capital cases require, or even suggest, that severance is necessary.

Fourth, while we consider Puiatti's § 2254 appeal separately from Glock's, this Court already has rejected Glock's claim that a joint trial deprived him of an individualized sentencing determination. *See Glock V*, 84 F.3d at 385-86 (rejecting as non-meritorious Glock's claim "that his sentence should be set aside because ... the trial court refused to sever his sentencing proceeding from his co-defendant's, thereby depriving him of individualized sentencing").

For all four reasons, Puiatti has not shown the state trial court's severance denial deprived Puiatti of his constitutional right to an individualized sentencing determination.

We could stop here but for the fact that Puiatti, as a pre-AEDPA petitioner, also tries to advance a new constitutional theory.[30] Even though a separate penalty trial is not part of his constitutional right to

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[30] Under AEDPA, a petitioner must show the state court's decision denying his claim "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States " 28 U.S.C § 2254(d)(1) The phrase "clearly established Federal law" refers "to the holdings, as opposed to the dicta, of the Supreme Court's decisions as of the time of the relevant state-court decision " *Spencer v. Sec'y, Dep't of Corr* , 609 F.3d 1170, 1178 (11th Cir 2010) (brackets omitted) Here, however, Puiatti filed his § 2254 petition before the enactment of AEDPA.

an individualized sentencing determination, Puiatti argues that the severance denial and joint penalty phase, under the facts of his case, prejudiced him to the point of effectively denying his constitutional right to an individualized sentencing decision or at least a fair hearing. A threshold problem for Puiatti is that he has not shown any severance error at all, much less severance error rising to the level of a constitutional violation.

For example, Puiatti has not satisfied the prejudice requirement at *Zafiro*'s first step for analyzing severance claims. Puiatti claims he was prejudiced because his mitigation theory—substantial domination by Glock—was undermined by Glock's mitigation defense that Glock was a follower, too. However, Glock's expert Dr. Mussenden, although testifying Glock was a follower, also testified that Glock's role in Ritchie's murder was an "expression of [Glock]'s anger and resentment towards women and all of the failure and rejection he had experienced all his life."[31] In closing, Glock's counsel never argued that Glock was under the substantial domination of Puiatti at the time of the crime and expressly disclaimed any argument to that effect.

If anything, Glock and Puiatti presented similar mitigation theories-counsel for Puiatti and Glock both argued their clients were insecure, easily led men who were under stress because of personality problems, unfortunate circumstances, and poor relationships with their families, but who nevertheless would not have committed the murder but for the presence and association of the other. Simply put, the

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[31] Dr. Mussenden had not examined Puiatti.

defendants did not present antagonistic mitigation defenses.

In any event, the Supreme Court has held expressly that "[m]utually antagonistic defenses are not prejudicial *per se*." *Zafiro*, 506 U.S. at 538, 113 S.Ct. at 938. "The Supreme Court has held that co-defendants do not suffer prejudice simply because one co-defendant's defense directly inculpates another, or it is logically impossible for a jury to believe both co-defendants' defenses." *Blankenship*, 382 F.3d at 1125 (discussing *Zafiro*). This also underscores the vital role of a joint trial in preventing inconsistent verdicts.

Puiatti also complains that Glock's counsel (as well as the State) got to cross-examine Puiatti's mental health experts, Drs. DelBeato and Meadows. This also did not prejudice Puiatti. Glock's counsel's questioning of DelBeato and Meadows was brief, with only a few questions each. Glock's counsel had DelBeato and Meadows admit that neither expert had examined Glock and that whether Puiatti was influenced by Glock depended on Glock's psyche as well as Puiatti's.[32] Glock's counsel's cross-examina-

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[32] Glock's counsel's entire cross-examination of Dr DelBeato was

> Q Dr DelBeato, is it true that most people are more easily influenced when they're under stress?
>
> A Yes
>
> Q And is it fair to say that whether or not somebody is being influenced or manipulated by another, that [not] only depends on the person, the psychological profile of the person that's being influenced, but also the possibility of a person who's in the position to influence the psychological profile?
>
> A. There would be a relationship.

tion did not cause the introduction of irrelevant or incompetent evidence. "[A] fair trial does not include the right to exclude relevant and competent evidence." *Zafiro*, 506 U.S. at 540, 113 S.Ct. at 938.

Puiatti also argues that the fact that Glock testified, and Puiatti did not, prejudiced him. Puiatti points to no case in which the Supreme Court or this Court has held that a non-testifying defendant is prejudiced by the mere fact that one of his co-defendants chooses to testify. In fact, we have concluded that "favorable observation of the willingness of one of several co-defendants to testify does not constitute an impermissible comment on the failure of the other co-defendants to testify." *United States v. O'Neill*, 767 F.2d 780, 786 (11th Cir.1985) (quoting *United States v. Vera*, 701 F.2d 1349, 1363 (11th Cir.1983)). Moreover, Puiatti's argument ignores that Glock testified

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Q. And you have never examined this man?

A. No.

Glock's counsel's cross-examination of Dr. Meadows was similarly brief:

Q. Dr. Meadows, whether-is it fair to say that whether or not Mr. Puiatti was under substantial domination of another person at the time of the offense would depend on the psychological profile of the other person?

A. Without understanding, you know, in detail, I would say it is possible, yes.

Q. Have you ever done any tests or reviewed any records of Robert Glock, II?

A. The confession, um, I have had some sketchy data about his background and temperament from the defendant, from Mr. Puiatti's counselor.

Q. Okay. But you have not seen any psychological testing, reports of Mr. Glock, is that correct?

A. That's correct.

briefly and only about the remorse he felt for Ritchie's murder. Puiatti used multiple penalty-phase witnesses to testify that he too was remorseful. Puiatti was able to, and did, impart similar testimony to the jury without testifying.[33] If anything, the fact that Glock testified helped Puiatti because Glock did not deny the joint confession's statements that Glock suggested the idea of killing Ritchie and Glock fired the last two shots that killed her.

Puiatti also argues the fact that Glock argued the mitigating factor of no significant prior criminal history applied to him highlighted Puiatti's lack of ability to argue this factor for himself. However, Puiatti's own penalty-phase witnesses testified that Puiatti was involved in a burglary and was on probation at the time of Ritchie's murder. Even in a separate penalty trial, the jury would know Puiatti already had a criminal history.[34] There was no vast disparity in either the quality or quantity of mitigation evidence presented by Puiatti and Glock.

The bottom line is Puiatti's prejudice claim essentially rests upon an implicit contention that a separate penalty trial is required whenever a co-defen-

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[33] We reject Puiatti's argument that he was prejudiced by the fact that Glock's penalty-phase witnesses testified after Puiatti's expert Dr. DelBeato but before Puiatti's other witnesses, thereby splitting Puiatti's case. Not only does this argument rest on a canard that jurors are unable to account for an out-of-order witness, but Puiatti's own counsel requested that Dr. DelBeato testify first in order to accommodate Dr. DelBeato's schedule.

[34] And even in a separate penalty phase, the State would have been entitled to point to Glock's lack of prior criminal history to rebut a potential argument by Puiatti that Puiatti was an easily influenced man who was following Glock's lead in murdering Ritchie.

dant's presence might reduce a defendant's chance to avoid a death sentence. We have found nothing in severance law or Eighth Amendment jurisprudence to support this position. *See Zafiro*, 506 U.S. at 540, 113 S.Ct. at 938 (stating that "it is well settled that defendants are not entitled to severance merely because they may have a better chance of acquittal in separate trials"). Puiatti has failed to show any specific way that he was prejudiced by being tried jointly with Glock at the penalty phase.

Indeed, the specific facts of this case made a joint penalty phase particularly appropriate. Puiatti and Glock acted together in planning and effecting the abduction, robbery, and murder of Ritchie. Both Puiatti and Glock fired shots at Ritchie. It was Puiatti who was the first to fire shots at and strike the helpless victim from close range. Puiatti and Glock issued a joint interlocking confession that agreed on how many shots were fired, who fired each of them, and when. Puiatti and Glock kept driving by and shooting Ritchie until they were sure she would die. As the state trial court aptly noted, this case is a "classic example of why joint defendants ought to be [tried] together in order to get justice."

In fact, Puiatti's joint trial with Glock avoided the inequity of inconsistent verdicts and one capital defendant going second with the benefits of previewing the State's evidence and arguments. *See Richardson*, 481 U.S. at 210, 107 S.Ct. at 1708-09 (stating, "Joint trials generally serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts" and by not "randomly favoring the last-tried defendants who have the advantage of knowing the prosecution's case beforehand"). The *Lockett-Eddings-Penry-Abdul-Kabir* principle that the sentencer must

be allowed to consider and give effect to "all relevant mitigating evidence," *see Eddings*, 455 U.S. at 117, 102 S.Ct. at 878, is quite compatible with a joint trial. To the extent any arguable tension may exist between joint trials and individualized sentencing, it did not occur here. *See Bernard*, 299 F.3d at 475 (noting potential tension between joinder and a defendant's right to an individualized capital sentencing decision, but affirming defendant's death sentence in a joint trial).

If any two capital co-defendants could be properly joined in a penalty phase, it was Puiatti and Glock. Puiatti has not shown that his severance denial violated any constitutional right.

V. CONCLUSION

Accordingly, we reverse the district court's judgment vacating Puiatti's death sentence. On remand, the district court shall consider and resolve all of Puiatti's other constitutional claims as to his death sentence.

REVERSED AND REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT,
M.D. FLORIDA, TAMPA DIVISION.

Case No. 8:92-CV-539-T-17EAK.

CARL PUIATTI,

Petitioner,

v.

SECRETARY, DEPT. OF CORRECTIONS,

Respondent.

Aug. 14, 2009.

ORDER

ELIZABETH A. KOVACHEVICH, *District Judge*.

This cause is before the Court on Petitioner Puiatti's amended petition for a writ of habeas corpus under 28 U.S.C. § 2254 (Dkt. 88). Puiatti, an inmate at Union Correctional Institution, challenges his conviction and sentence to death for first degree murder, kidnapping, and robbery, arising out of the Sixth Judicial Circuit, Pasco County, Florida, in case no. 83-1383. After a careful review of the record, this Court finds that Puiatti's petition must be granted as to the penalty phase of his trial, and denied as to the guilt phase of his trial.

PROCEDURAL HISTORY

On August 16, 1983, Petitioner Carl Puiatti and his co-defendant, Robert Glock, were charged by indictment with first degree murder, kidnapping, and

robbery. Puiatti and Glock were tried jointly by jury. The jury returned a verdict of guilty for both defendants. In a joint penalty phase, the jury recommended death for each by a vote of 11-1. On May 16, 1984, the state trial court judge sentenced Puiatti and Glock to death.

On direct appeal, the Florida Supreme Court affirmed Puiatti's conviction and sentence. *Puiatti v. State*, 495 So.2d 128 (Fla.1986). Puiatti filed a petition for writ of certiorari in the United State Supreme Court. On April 27, 1987, 481 U.S. 1027, 107 S.Ct. 1950, 95 L.Ed.2d 523 (1987), the Supreme Court vacated the Florida Supreme Court's decision, and remanded to the Florida Supreme Court for reconsideration in light of *Cruz v. New York*, 481 U.S. 186, 107 S.Ct. 1714, 95 L.Ed.2d 162 (1987). On re-hearing, the Florida Supreme Court reaffirmed the state trial court's decision and sentence. *Puiatti v. State*, 521 So.2d 1106 (Fla.1988). Puiatti applied for a writ of certiorari in the United States Supreme Court. The United States Supreme Court denied Puiatti's application. *Puiatti v. Florida*, 488 U.S. 871, 109 S.Ct. 184, 102 L.Ed.2d 153 (1988).

Puiatti then filed a Rule 3.850 motion, which was summarily denied by the state trial court. Puiatti appealed, and simultaneously filed a state petition for writ of habeas corpus in the Florida Supreme Court. In a consolidated opinion, the Florida Supreme Court affirmed the denial of the Rule 3.850 motion, and denied Puiatti's application for habeas corpus relief. *Puiatti v. Dugger*, 589 So.2d 231 (Fla.1991).

Puiatti sought relief with this Court by filing a 28 U.S.C. § 2254 petition for writ of habeas corpus on April 23, 1992. Subsequently, this Court granted a stay and abey motion to allow Puiatti to exhaust

remedies and pursue new claims in state court. Pursuant to the stay and abey motion, this Court administratively closed the case.

On January 30, 2003, Puiatti filed a Rule 3.851 motion to vacate sentence in state court, pursuant to *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) and *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), alleging that he was mentally retarded. The state trial court denied Puiatti's motion on May 30, 2003. Puiatti appealed, and on November 12, 2004, the Florida Supreme Court issued an order treating the appeal as a motion to relinquish jurisdiction to the state trial court on the issue of mental retardation. *See*, Fla. R.Crim. Pro. 3.203. The Florida Supreme Court granted the motion to relinquish jurisdiction, and relinquished jurisdiction to the state trial court on the issue of mental retardation.

While the question of mental retardation was pending in the state trial court, Puiatti withdrew his claim of mental retardation. After reviewing expert reports and considering Puiatti's withdrawal of his claim, the state trial court issued an order on April 18, 2005, ruling that Puiatti was not mentally retarded. On June 8, 2005, this Court entered its order on the issue of mental retardation, ruling that Puiatti was not entitled to relief under *Ring* and *Atkins*.

On July 19, 2005, Puiatti filed another Rule 3.851 motion to vacate sentence in the state trial court, claiming that new law required the state trial court to consider the motion. The state trial court disagreed, and denied Puiatti's motion on September 7, 2005. The Florida Supreme Court affirmed the denial of relief. *Puiatti v. State*, 939 So.2d 1060 (Fla.2006).

On May 15, 2008, this Court reopened the case, dismissing the original petition without prejudice to Puiatti's filing an amended petition. On November 24, 2008, Puiatti filed an amended petition for a writ of habeas corpus and a memorandum of law in support (filed November 21, 2008). The response was filed on April 17, 2009. Puiatti filed a reply on July 15, 2009.

STATEMENT OF FACTS

The Florida Supreme Court set out the facts in *Puiatti v. State*, 495 So.2d 128 (Fla.1986). In essence, the Florida Supreme Court stated:

The trial record reflects that on August 16, 1983, the female victim, Mrs. Sharilyn Ritchie, arrived at a Bradenton shopping mall. As she exited her automobile, Puiatti and Glock confronted her, forced her back inside the car, and drove away with her. They took $50 from her purse and coerced her into cashing a $100 check at her bank. They drove the victim to an orange grove outside Dade City in Pasco County, where they took Mrs. Ritchie's wedding ring and abandoned her in the orange grove. After driving a short distance, Puiatti and Glock determined that Mrs. Ritchie should be killed, and they returned. Puiatti then shot her twice. Puiatti and Glock drove away, but, when they saw she was still standing, they drove by Mrs. Ritchie again and Glock shot her. When she did not fall, Puiatti and Glock made a third pass with the automobile; Glock shot her another time, and Mrs. Ritchie collapsed.

Four days later, a New Jersey state trooper stopped Puiatti and Glock in Mrs. Ritchie's vehicle in New Jersey, because the license plate was improperly displayed. When neither Puiatti nor Glock could pre-

sent a valid driver's license, the officer requested the car's registration. Puiatti opened the glove box, and the trooper saw a handgun. The officer seized that handgun, searched the vehicle, and uncovered another handgun. He then arrested both men for possession of handguns without permits. The police later identified the handgun from the glove box as the murder weapon.

The next day Puiatti and Glock individually confessed to the kidnapping, robbery, and killing. These initial confessions varied only to the extent that each blamed the other as being the instigator of the murder and each offered a different sequence as to who fired the shots at the victim. Both Puiatti and Glock admitted he shot the victim. Three days later, on August 24, 1983, Puiatti and Glock made a joint statement in which they resolved the inconsistencies in their prior individual statements: they agreed that Glock initially suggested shooting the victim; that Puiatti fired the first shots; and that Glock fired the final shots.

Before trial, both Puiatti and Glock moved to sever their trials on the ground that the State intended to introduce each defendant's individual confession. The state trial court denied the motions. At trial, neither Puiatti nor Glock testified on his own behalf, and the three confessions—the two individual confessions and the joint confession—were admitted into evidence. Each defendant objected only to the introduction of the individual confessions. The state trial court overruled Puiatti's and Glock's objections, but, before admitting each individual statement, the state trial court instructed the jury to disregard each defendant's individual confession to the extent that it tended to implicate the other defendant.

The jury found each defendant guilty of first-degree murder, kidnapping, and robbery. In the joint penalty phase, Puiatti did not rely on the mitigating factor of no significant prior criminal history, but offered psychiatric testimony to support the assertion that he was under Glock's substantial domination at the time of the crimes, Glock argued that his lack of significant prior criminal history and psychiatric evidence suggesting that he would not have participated in the crime but for his association with Puiatti constituted mitigating factors. The jury, by an 11-to-1 vote, recommended the death penalty for both Puiatti and Glock.

The state trial court judge, after weighing the aggravating and mitigating circumstances, sentenced Puiatti and Glock to death. The state trial court judge found no mitigating circumstances and that the state had proven three aggravating factors: (1) the murder was committed to avoid arrest [section 921.141(5)(e), Florida Statutes (1983)]; (2) the murder was committed for pecuniary gain [section 921.141(5)(f), Florida Statutes (1983)]; and (3) the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification [section 921.141(5)(i), Florida Statutes (1983)].

THE PETITION

The instant petition presents the following grounds for relief:

> Ground One: The trial court's refusal to sever Puiatti's penalty phase from that of his co-defendant deprived him of an individualized sentencing determination in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments.

Ground Two: Puiatti was denied the effective assistance of counsel during the guilt phase of his trial in violation of the Sixth, Eighth and Fourteenth Amendments.

Ground Three: Puiatti was denied effective assistance of counsel during the penalty phase of his trial in violation of the Sixth, Eighth and Fourteenth Amendments.

Ground Four: Puiatti was denied effective assistance of counsel on direct appeal in violation of the Sixth, Eighth, and Fourteenth Amendments.

Ground Five: Puiatti's Eighth Amendment rights were violated by the trial court's refusal to find mitigating circumstances clearly set out in the record.

Ground Six: The trial court's refusal to provide Puiatti's sentencing jury with instructions explaining the aggravating circumstances submitted to it violated Puiatti's Eighth and Fourteenth Amendment rights and rendered his death sentence invalid.

Ground Seven: The prosecutor's inflammatory arguments during the guilt and penalty phases of the trial rendered the proceedings fundamentally unfair and unreliable in violation of the Eighth and Fourteenth Amendments.

Ground Eight: The admission of Glock's confession violated *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), and deprived Puiatti of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments.

STANDARD OF REVIEW

A petition for a writ of habeas corpus will issue only if the state court proceedings were flawed to the extent that they violated federal law: "In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." *Estelle v. McGuire*, 502 U.S. 62, 68, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991) (citing 28 U.S.C. § 2241). Since this Petition was filed prior to the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), this case is governed by pre-AEDPA law. Generally, pre-AEDPA review of state court proceedings is less deferential than review under AEDPA.

A. *Evidentiary Hearings*

In contrast to AEDPA, which requires an evidentiary hearing only if the relevant state-court decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," 28 U.S.C. § 2254(d)(2), pre-AEDPA law dictates that "a federal evidentiary hearing is required unless the state-court trier of fact has after a full hearing reliably found the relevant facts." *Townsend v. Sain*, 372 U.S. 293, 312-313, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963), *overruled on other grounds by Keeney v. Tamayo-Reyes*, 504 U.S. 1, 5, 112 S.Ct. 1715, 118 L.Ed.2d 318 (1992).

Specifically, *Townsend* dictates that a court must grant an evidentiary hearing under any of the following circumstances:

> (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole: (3) the fact-finding procedure

> employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

Id. at 313, 83 S.Ct. 745.

B. *Procedural Default*

For a federal court to review a claim in a habeas petition, a petitioner "must have presented his claims in state court in a procedurally correct manner." *Upshaw v. Singletary*, 70 F.3d 576, 579 (11th Cir. 1995). "A state court's denial of a claim based on a procedural violation generally bars a federal court from considering the claim." *Id.* In addition, state courts must have been given a fair opportunity to adjudicate the claims in a petition before they are brought in federal court. *Picard v. Connor*, 404 U.S. 270, 275, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971) (holding that claims not "fairly presented" in state court are unexhausted and will not be entertained in federal court).

If a claim is procedurally defaulted, this Court only will entertain the claim if a petitioner can show either (1) cause for default and actual prejudice, or (2) a fundamental miscarriage of justice resulting in the conviction of an "actually innocent" defendant. *See Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977); *Murray v. Carrier*, 477 U.S. 478, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986).

C. *Actual Prejudice*

Finally, a habeas petition will only be granted if the Constitutional violation at the trial level resulted in "actual prejudice" to the petitioner. *Brecht v. Abrahamson*, 507 U.S. 619, 637, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993) (holding that simply establishing error in state court proceedings is not sufficient for a writ of habeas corpus to issue). The alleged error must have had a "substantial and injurious effect or influence in determining the jury's verdict." *Id.* at 637-638, 113 S.Ct. 1710.

PENALTY PHASE

Ground One: Failure to Sever Penalty Phase

A. *Procedural Default*

Respondent urges that Ground One of the Petition is procedurally barred because it was not raised on direct appeal. However, a review of the state record shows that this is not the case. On direct appeal, Puiatti alleged that "[t]he trial court abused its discretion by denying Puiatti's motion to sever his trial from that of his co-defendant." While this allegation does not specifically implicate the penalty phase of Puiatti's trial as it relates to the Eighth Amendment, the claim objects to the failure to sever the *entire* trial, including the penalty phase. The Florida Supreme Court spoke directly to the issue of severance of the penalty phase of the trial in its opinion: "he [Puiatti] claims that the trial court's denial of a severance in the penalty phase prejudiced him." *Puiatti v. State*, 495 So.2d 128, 131 (1986). Since the claim was fairly presented to the Florida Supreme Court on direct appeal and adjudicated on its merits. Ground One is not procedurally defaulted.

B. *Evidentiary Hearing*

No evidentiary hearing is required as to Ground One, as the claim only requires the Court to determine whether, as a matter of law, Puiatti had a Constitutional right to an individualized sentence, and whether that right was violated. All evidence required to make that determination is in the record.

C. *Constitutional Violation*

Puiatti argues that the Eighth Amendment guarantees a right to individualized sentencing in a capital case. Puiatti mainly relies on *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), which invalidated an Ohio statute for Eighth and Fourteenth Amendment violations, stressing that "the Eighth and Fourteenth Amendments require that the sentencer be given a full opportunity to consider mitigating circumstances in capital cases." *Lockett*, 438 U.S. at 602, 98 S.Ct. 2954. Puiatti also points to several recent cases in which courts have severed sentencings to protect a co-defendant from prejudice. *See United States v. Henderson* 442 F.Supp.2d 159, 160, 162-163 (S.D.N.Y.2006) (severing the penalty phase of a capital case, and instead ordering sequential sentencing proceedings, to avoid potential prejudice resulting from the comparison of co-defendants' mitigating evidence); *United States v. Catalan-Roman*, 376 F.Supp.2d 96, 106-107 (D.P.R. 2005) (severing the penalty phase of a capital case due to a disparity between the strength of two co-defendants' mitigating evidence). In *Catalan-Roman*, the court found unconstitutional the possibility that "[t]he jury could possibly balance one defendant against the other and decide which of the two was worse and deserved the harshest penalty." *Catalan-Roman*, 376 F.Supp.2d at 107. Puiatti asserts that

the penalty phase of his trial deprived him of the opportunity to effectively present mitigating evidence to the jury, and therefore compromised the individual sentencing determination guaranteed by the Eighth and Fourteenth Amendments.

In response, Respondent argues that joint trials are an essential part of the criminal justice system. Citing *Richardson v. Marsh*, 481 U.S. 200, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987). Respondent contends that "[j]oint trials generally serve the interests of justice by avoiding inconsistent verdicts and enabling more accurate assessment of relative culpability." *Id.* at 209-210, 107 S.Ct. 1702. Respondent also cites several cases upholding decisions not to sever joint trials. In *Zafiro v. United States*, 506 U.S. 534, 113 S.Ct. 933, 122 L.Ed.2d 317 (1993), the Supreme Court held that a trial court is not required to sever the trials of co-defendants who present mutually antagonistic defenses. Likewise, the Eleventh Circuit has held that a joint trial is inappropriate only if it "(1) would compromise a specific trial right of one of the defendants, or (2) would prevent the jury from making a reliable judgment about guilt or innocence." *United States v. Browne*, 505 F.3d 1229, 1268-1269 (11th Cir.2007) (citations omitted). Respondent asserts that since Puiatti and Glock "participated as a team in the kidnap-murder of Sharon [sic] Ritchie, it is not unreasonable for a jury to also consider their culpability and penalties together." Response to Petition at 22. Respondent compares a joint penalty phase to a situation in which a capital defendant seeks to mitigate his own sentence by asking a jury to consider the sentence imposed on an accomplice or a co-defendant.

Respondent's points may be valid with respect to joint *guilt phases*; however, Puiatti complains of Constitutional violations arising out of a joint *penalty phase*. Puiatti's argument is not that he and Glock presented "antagonistic defenses," but rather that Glock's involvement in Puiatti's penalty phase substantially impaired Puiatti's ability to present mitigating evidence, as guaranteed by *Lockett*. Respondent is correct that a capital defendant can ask a jury to consider his co-defendant's sentence, hoping to receive a similar or lesser sentence, but the capital defendant's doing so is fundamentally different from the alleged violation in this case. Puiatti alleges not only that the jury compared Puiatti to Glock in determining their respective sentences, but also that the sentencing process fundamentally compromised the jury's ability to differentiate one defendant from the other, and deprived Puiatti of individualized consideration in sentencing. Even under the precedent set forth in *Browne*, a joint penalty phase was inappropriate, because it compromised one of Puiatti's Constitutional rights at trial: the right to an individualized determination of sentence in a capital case.

This Court need not decide whether the Eighth and Fourteenth Amendments guarantee the right to a separate penalty phase in any capital case involving co-defendants. *Lockett* and its progeny, as applied to the facts of this case, indicate that Puiatti had a Constitutional right to a severed penalty phase.[1]

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[1] Respondent argues this Court must reject Puiatti's assertion of an Eighth Amendment violation because it rejected Glock's habeas petition, *Glock v. Dugger*, 752 F.Supp. 1027 (M.D.Fla.1990). However, the sentencing proceedings affected each co-defendant differently, and resulted in varying levels of prejudice. Further, this Court did not reach the issue of an Eighth Amendment

Lockett makes it clear that a defendant has the right to the sentencers' full and unencumbered consideration of mitigating factors, and any interference with that right is a Constitutional violation. While this Court frowns upon undue severance, Puiatti has sufficiently implicated a Constitutional violation because he had a Constitutional right to individual determination of sentence. The question then becomes whether that violation resulted in actual prejudice to Puiatti.

D. *Actual Prejudice*

Even if Puiatti sufficiently alleges a Constitutional violation, a writ of habeas corpus will not issue unless the Constitutional violation resulted in actual prejudice at the trial level. Puiatti points to the structure of the penalty phase, alleging the jury was not given the opportunity to consider Puiatti's individual mitigating factors. Respondent argues that Puiatti has not shown actual prejudice, and that any Constitutional violation in Puiatti's penalty phase does not rise to the level required for a writ of habeas corpus to issue.

i. Opening Arguments and Witnesses

There is ample evidence in the record to suggest that Puiatti's penalty phase was significantly different from what it would have been had Puiatti's motion to sever been granted. At the beginning of the penalty phase, the state trial court asked counsel whether they wanted to make opening statements. Puiatti's attorney told the court that she had an opening statement prepared and would like the opportunity to

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violation in the *Glock* decision, because it was not raised in Glock's habeas petition.

give the statement, while the State indicated it was prepared but had no preference on the issue, Glock's attorney, however, urged the court not to allow an opening statement from any party. The state trial court declined to allow opening statements, which it likely would have allowed had Puiatti been sentenced in a severed penalty phase.[2] R. 2216-2217. While not rising to the level of actual prejudice to Puiatti, this decision not to allow opening statements was the first of many ways in which Puiatti's joint penalty phase differed from an individual penalty phase.

Puiatti alleges prejudice stemming from the fact that the jury listened to two sets of mitigation witnesses during the penalty phase. The order of witnesses during the penalty phase was as follows: (1) witnesses for the State; (2) Puiatti's expert witness: (3) Glock's witnesses, including an expert witness; and (4) the remainder of Puiatti's witnesses. Each witness was cross-examined by the two other parties. Puiatti argues that the order of witnesses and Glock's cross-examination of Puiatti's witnesses prejudiced the jury to the point that the its recommendation as to Puiatti's sentence was not determined as to Puiatti as an individual. Respondent counters that the record reflects that Puiatti did not object to the order of witnesses, and was in fact happy to allow his expert

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[2] Puiatti also argues that prejudice is evident from the fact that Puiatti's family members were not allowed to remain in the courtroom during the penalty phase as a result of Glock's objections to their doing so. Glock urged the state trial court judge to exercise his discretion and not allow Puiatti's non-testifying family members to remain in the courtroom during the penalty phase. R. 2221. While this is a factor that distinguished Puiatti's penalty phase from a typical penalty phase, it does not inform any prejudice.

witness to testify out of order.[3] Further, Respondent argues that the State asked the majority of questions on cross-examination, and that Glock's cross-examination of Puiatti's witnesses had a minimal impact on the proceeding.

That Puiatti did not object to the order of witnesses during the penalty phase does not preclude him from claiming now that the order of witnesses prejudiced the jury. Puiatti called his expert witness. Dr. Donald Delbeato. to support the assertion that Puiatti "acted under extreme duress or under the substantial domination of another person," a mitigating factor under Florida law. *See* Fla. Stat. § 921.141(6)(e). Dr. Delbeato testified that Puiatti was easily influenced, and likely would not have committed the offenses but for Glock's influence. In a severed penalty phase, Dr. Delbeato would have been cross-examined only by the State. However. Dr. Delbeato was cross-examined not only by the State, but also by Glock's counsel. Further, Glock called his own expert witness to attest that *Glock* was the more easily influenced of the two co-defendants, in direct contradiction to the testimony of Puiatti's witnesses.[4] Even disregarding the order in which the witnesses testified, Puiatti's ability to present mitigating evidence was substantially diminished by the joint proceeding. Respondent correctly states that courts have allowed defendants to

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[3] The state trial court record is unclear as to the reasoning behind Puiatti's expert witness's testifying out of order.

[4] Respondent asserts that the testimony of Glock's expert, Dr Gerald Mussenden, was cured by Puiatti's ability to cross-examine Dr Mussenden. However, even if Puiatti's counsel effectively discredited Dr Mussenden's testimony, Puiatti's expert witness would not gain any credibility he had lost as a result of Glock's cross-examination.

be *tried* together even when they present contradictory defenses, but a joint trial does not implicate the Eighth Amendment as a joint capital penalty phase does. Even if Puiatti's witnesses had been cross-examined only by the State at the joint penalty phase of the trial, the proceeding would have implicated Puiatti's Constitutional rights, as the Constitution does not permit a penalty phase in which two co-defendants attempt to present mutually exclusive mitigating factors. *See, e.g., Lockett*, 438 U.S. 586, 98 S.Ct. 2954. By its very nature, such a joint penalty phase impedes a jury's ability to individually consider each defendant, as demanded by the Eighth and Fourteenth Amendments.

ii. *Puiatti's Failure to Testify*

Puiatti also complains that Glock testified on his own behalf, while Puiatti could not testify because he would have been impeached with two prior convictions that were otherwise inadmissible due to his waiver of the "prior criminal activity" mitigating factor. *See* Fla. Stat. § 921.141(6)(a). Glock's testimony, Puiatti alleges, further contributed to the jury's view that the penalty phase was a "competition between defendants over who has more or stronger mitigation or who is a better or more forthcoming person." Amended Petition at 14. Puiatti claims that "the denial of severance . . . clearly penalized Puiatti for exercising his right not to testify." *Id.*

Respondent counters that Glock's testimony was insignificant, as shown by the fact that Puiatti's counsel opted not to cross-examine Glock. Further, Respondent asserts that Puiatti voluntarily chose not to assert the "prior criminal activity" mitigating factor, and cannot now complain that he did not have the opportunity to testify.

Respondent is correct in pointing out that Puiatti chose not to testify on his own behalf. Puiatti could not reap the benefits of testifying without facing impeachment with prior convictions on cross-examination. However, Puiatti's choosing not to testify on his own behalf would not have been significant to the jury but for Glock's testifying. A defendant has the right not to testify in a penalty phase, and any suggestion to the jury that the exercise of that right is somehow significant is violative of the Constitution. *Griffin v. California*, 380 U.S. 609, 614-615, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965) (holding that while a jury may, as a practical matter, infer guilt on its own from a defendant's failure to testify, but that comment on that failure to testify violates the Constitution); *Carter v. Kentucky*, 450 U.S. 288, 101 S.Ct. 1112, 67 L.Ed.2d 241 (1981) (holding that if a defendant requests it, a trial judge must instruct a jury that no adverse inference can be drawn from a defendant's failure to testify). But for the joint penalty phase, Puiatti's jury would not have been able to compare Glock's testifying to Puiatti's silence. The Fifth Amendment does not allow a joint penalty phase where the testimony of one defendant highlights to the jury the other defendant's failure to testify. *See Griffin*, 380 U.S. 609, 85 S.Ct. 1229; *Carter*, 450 U.S. 288, 101 S.Ct. 1112.

iii. *Prosecutor's Closing and Jury Instructions*

Puiatti alleges that the prosecutor in the penalty phase took advantage of the joint proceeding to further de-individualize Puiatti, as the prosecutor had done during the guilt phase of Puiatti's trial. Puiatti complains that the prosecutor called Puiatti and Glock "as alike as two peas in a pod." R. 2482. Further, the prosecutor described the co-defendants

as having a "symbiotic relationship," arguing that neither would have committed the crime without the other. R. 2483. Respondent contends that there was nothing improper about the prosecutor's closing argument, as shown by the lack of objection from Puiatti's counsel, and that the prosecutor was simply urging that *both* defendants deserved the death penalty.

While Respondent is correct that under the circumstances, the prosecutor's closing argument was not improper, the prosecutor was only able to make such an argument because the penalty phase was joint. Had Puiatti's penalty phase been severed from Glock's, the prosecutor would have been forced to argue directly against Puiatti's mitigating circumstances, rather than to group the co-defendants together, further de-individualizing Puiatti. Of most concern is the prosecutor's "symbiotic relationship" argument; Puiatti and Glock were already battling to convince the jury that each of them was under the influence of the other, and the prosecutor used that battle to suggest that they were equally culpable, and deserved the same punishment. The prosecutor cannot be faulted for his closing argument, but it compounded the lack of individualization already present in the case.

Puiatti also alleges that prejudice is evident from the actions and words of the state trial court during sentencing, and the subsequent treatment of the case on direct and collateral appeal. Puiatti points to a portion of the jury instructions in which the state trial court judge instructed the jury: "it is now your duty to advise the court as to what punishment should be imposed upon Glock and Puiatti." R. 2521. Puiatti asserts that the phrasing of the jury instruc-

tions suggest that the jury should impose a *single punishment* on Puiatti and Glock, rather than determine their sentences individually. Respondent counters that the jury instructions taken as a whole clearly individualize the defendants:

> Now, if a majority of the jury determine that Robert Glock, II, should be sentenced to death, your advisory sentence will be a majority of the jury, by a vote of-and a number of whatever number voted so voted advise and recommend to the Court that it impose the death penalty upon Robert D. Glock, II.
>
> If a majority of the jury determine that Carl Puiatti should be sentenced to death, your advisory sentence will be a majority of the jury, by a vote of-and indicated whatever that vote is, advise and recommend to the Court that it impose the death penalty upon Carl Puiatti.
>
> On the other hand, if by six or more votes, the jury determines that Robert D. Glock. II, should not be sentenced to death, your advisory sentence will be the jury advises and recommends to the Court that it impose a sentence of life imprisonment upon Robert D. Glock, II, without possibility of parole for twenty-five years.
>
> And if by six or more votes the jury determines that Carl Puiatti should not be sentenced to death, your advisory sentence will be the jury advises and recommends to the Court that it impose a sentence of life imprisonment upon Carl Puiatti without possibility of parole for twenty-five years.

R. 2525-2527. While the jury instructions were not prejudicial to Puiatti, it is disconcerting that the

court's sentencing order tended to refer to Puiatti and Glock as a pair, rather than as individuals: "They were both about the same age and the same intelligence. They both had the same education. They were both raised in middle class surroundings." Findings in Support of Sentences at 5.

iv. *Appellate Review*

Puiatti also points to the Florida Supreme Court's treatment of Puiatti and Glock as evidence that the joint penalty phase created the impression that the co-defendants were a singular unit. Puiatti argues that the Florida Supreme Court's consolidation of the cases and issuance of a joint opinion further contributed to Puiatti's denial of individualized consideration in violation of the Constitution. Further, Puiatti points out that the state trial court, when subsequently reviewing Puiatti's Rule 3.850 motion, incorrectly referenced Puiatti's testifying "on his on [sic] behalf" during the penalty phase, when it was actually Glock who spoke on his own behalf.

Respondent argues that the Florida Supreme Court's treatment of the Puiatti and Glock cases was not a deprivation of individual consideration, but rather a matter of convenience. Respondent points out that the Florida Supreme Court held separate oral arguments for the Puiatti and Glock cases, albeit on the same day, and devoted separate sections of their opinion to each defendant. Respondent also asserts that the state trial court may have made a typo-graphical error when it referred to Puiatti's testifying on his own behalf: "It is not clear whether the Court intended to say Mr. Puiatti (Puiatti's father) spoke on his son's behalf or whether it intended to say that Puiatti testified on his own behalf." Response to Petition at 32.

While the treatment of Puiatti and Glock as a pair by a sentencing *jury* is potentially violative of the Constitution, consolidation of their cases by the Florida Supreme Court is of less concern. The Florida Supreme Court heard separate arguments from the defendants, and conducted separate analyses in the joint opinion. Unlike the jury at the penalty phase, whose reasoning process is uncertain, it is clear that the Florida Supreme Court separated the two defendants for the purpose of appellate review, and afforded each a fair hearing. Although the Florida Supreme Court afforded Puiatti a fair hearing, its doing so did not cure the defects in Puiatti's penalty phase.

The state trial court, on the other hand, genuinely confused the co-defendants in its opinion. It is specious to suggest that the court made a typographical error, and intended to reference Puiatti's father; if Puiatti's father were speaking, it would not have been on his *own* behalf. The state trial court clearly confused Glock's testimony with Puiatti's. This confusion speaks directly to the nature of the joint penalty phase, and the risk that the joint penalty phase de-individualized each defendant in the eyes of the jury. While the state trial court's confusion is not dispositive, it is indicative of the larger violation Puiatti alleges.

v. *Conclusion*

Puiatti presents ample evidence to suggest that the Constitutional violation at Puiatti's joint penalty phase was sufficient to actually prejudice him.[5] The

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[5] It is worth noting that Puiatti presents statistical evidence that suggests jurors are more likely to vote for death in joint sentencing hearings. A 1994 study reported that prospective

thought process of a sentencing jury is unknown to all but the twelve deciding jurors; however, Puiatti has proven that the structure of the penalty phase created a substantial risk that the jury was unable to individualize Puiatti in reaching a sentencing recommendation. A defendant in a capital case must be afforded the full opportunity to present mitigating evidence. The Puiatti and Glock joint penalty phase severely impaired Puiatti's ability to present such evidence. Many of his mitigating witnesses were directly contradicted by Glock's witnesses; each of his mitigating witnesses was subject to double cross-examination; Glock's testimony highlighted Puiatti's failure to testify; and the prosecutor used the joint nature of the proceedings to further de-individualize the defendants. Together, these circumstances effected a crippling blow to Puiatti's individual identity in the eyes of the judge and jury, and violated his rights under the Eighth and Fourteenth Amendments.

Grounds Three, Five, Six, and Seven

Puiatti argues that there were other Constitutional deficiencies in the penalty phase of his trial. Grounds Three, Five, Six, and the portion of Ground Seven challenging the prosecutor's improper closing argument at the joint penalty phase are subsumed by Ground One because the Court has determined that Puiatti's Constitutional rights were violated during the joint penalty phase of his trial. Therefore, Grounds Three, Five, Six, and the portion of Ground Seven challenging

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jurors "voted for death 65.1% of the time" in a sentencing with three defendants, but "just 47.2% of the time when the defendant was tried alone." Edward J. Bronson, *Severance of Co-Defendants in Capital Cases: Some Empirical Evidence*, Cal. St. U., Chico, Discussion Paper Series No. 94-1 (1994).

the prosecutor's improper closing argument at the joint penalty phase are moot.

GUILT PHASE

Ground Two: Ineffective Assistance of Trial Counsel

Puiatti argues that he was denied effective assistance of counsel during the guilt phase of his trial. The basic test for ineffective assistance of counsel requires a petitioner to show (1) deficient performance by counsel, and (2) prejudice resulting from that deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Deficient performance is performance that falls "below an objective standard of reasonableness." *Id.* In applying the first prong of the *Strickland* test, a court must adhere to a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Id.* at 689-90, 104 S.Ct. 2052. The purpose of the *Strickland* analysis is not to grade attorney performance, or compare counsel's strategies to those of other lawyers: "Even the best criminal defense attorneys would not defend a particular client in the same way." *Id.* at 689, 104 S.Ct. 2052. Prejudice is established only when a petitioner shows that his trial was unfair or unreliable as a result of counsel's deficient performance, and that the outcome of his trial would have been different had counsel performed as a petitioner urges counsel should have performed. *Lockhart v. Fretwell*, 506 U.S. 364, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993). Merely showing that the result of a trial was affected by counsel's performance does not satisfy the prejudice prong of the *Strickland* test. *Id.*

A. *The Suppression Hearing*

Puiatti argues that he was denied effective assistance of counsel at his suppression hearing because Puiatti's counsel, William Eble, failed to prepare adequately for the suppression hearing, as shown by his failure to argue Puiatti's alleged (1) organic brain damage; (2) borderline retarded I.Q.; (3) emotionally stunted development and personality traits; and (4) inability to understand his *Miranda* rights.[6] Puiatti alleges that because Eble had a "tremendous caseload" at the time he represented Puiatti, he failed to adequately research legal reasons to suppress Puiatti's confessions. Puiatti also argues that Eble failed to discover and argue key facts relating to the voluntariness of Puiatti's confession. Specifically, Puiatti alleges Eble should have discovered that Puiatti was held for five days in isolation from every-one except police officers; was not allowed access to an attorney during his first five days in custody; was not arraigned until he had been in custody for nearly two days; and had been awake for more than 20 hours when he gave his joint confession with Glock.

i. *Psychological Defenses*

The record shows that Eble could not have raised successfully any psychological defenses at the suppression hearing to show that Puiatti's confessions were involuntary. Testimony from psychologists during the guilt phase of the trial showed that Puiatti was not mentally retarded, and, despite his

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[6] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)

having a below average I.Q., was capable of understanding his *Miranda* rights.[7]

Several factors for evaluating psychological defenses to the voluntariness of a confession are laid out in *Henyard v. McDonough*, 459 F.3d 1217, 1241 (11th Cir.2006), in which the court affirmed the rejection of the involuntary confession claim of an eighteen-year-old defendant:

> The totality of the circumstances indicate that (1) the police explained Henyard's rights to him twice; (2) Henyard's intelligence, although below average, was not so low that he could not understand his rights; (3) the transcript of the interrogation and Henyard's responses to the police give no indication that he was confused or that he misunderstood the seriousness of the interrogation; (4) the police did not engage in any trickery, deception, or improper interrogation tactics; and (5) Henyard had previous experience with the justice system.

Applying the *Henyard* factors to Puiatti's case, it is unlikely that the state trial court would have found Puiatti's confession to be involuntary based on Puiatti's ability to understand his rights. Further, even assuming that Eble could have successfully raised a psychological defense, his doing so would not have been sufficient for the state trial to suppress Puiatti's confession without additional evidence of police misconduct. *See Colorado v. Connelly*, 479 U.S. 157, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986) (holding that

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[7] In fact, Puiatti testified during the suppression hearing that he was repeatedly advised of his rights, and that he understood them.

police misconduct causally related to a confession is required to implicate a due process violation).

ii. *Custodial Treatment*

Puiatti also alleges that Eble was ineffective because he failed to make arguments related to the treatment of Puiatti while he was in custody. However, the record shows that Eble made many such arguments. Eble argued that Puiatti was not allowed to make a phone call to his uncle when Puiatti requested to do so. Suppression Hearing Transcript 46:4-14. Eble argued that Puiatti was not promptly taken before a judge upon Puiatti's arrest. *Id.* 46:15-48:6. Eble argued that Puiatti was not allowed to speak to a lawyer for several days after Puiatti's arrest. *Id.* 49:20-50:7. Eble argued that Puiatti was denied contact with everyone except police officers for several days during his detention. *Id.* 52:10-15. Puiatti's allegation that Eble did not effectively raise claims of improper detention during the suppression hearing are unfounded.

While Puiatti's co-counsel states that if she and Eble were to retry this case, they would proceed differently,[8] the benefit of hindsight will almost always reveal what seem to be better and stronger defense strategies. To fairly assess effectiveness of counsel, every effort must be made to eliminate the distorting effects of hindsight. *Strickland*, 466 U.S. at 696, 104 S.Ct. 2052. Puiatti's counsel effectively disputed the voluntariness of Puiatti's confession on the grounds that he was improperly detained, and perhaps coerced to confess. As to Puiatti's claim that

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[8] Puiatti quotes Puiatti's co-counsel, Ms. Howardene Garrett: "If I were to try this case over again today 1 would approach it entirely differently." Garrett Aff ¶ 11, App. 1.

Eble should have raised psychological defenses during the suppression hearing, the record shows the defenses would not have been successful. Puiatti has not shown that Eble's actions during the suppression hearing amounted to ineffective assistance of counsel.

B. *The Probative Value of Puiatti's Confessions*

Puiatti claims that he was denied effective assistance of counsel during the guilt phase of his trial because his counsel failed to contest the probative value of Puiatti's confessions. Puiatti asserts that Eble should have presented evidence to show that Puiatti's "personality disorder made him readily susceptible to suggestion and pressure" from police officers. Amended Petition at 25. Puiatti also argues that Eble did not know that testimony from mental health experts could be used during the guilt phase of Puiatti's trial, but rather thought it was only admissible during the penalty phase.

The defense that one has a dependent personality is not available in Florida. Any attempt to introduce evidence regarding Puiatti's alleged dependent personality disorder would have been denied by the trial court. See Order Denying Motion for Post-Conviction Relief at 10 (Apr. 27, 1990). Further, even if Puiatti could have successfully introduced evidence of his having a dependent personality to cast doubt upon the probative value of his confessions, the tactic would have failed. The prosecution relied on a substantial amount of additional inculpatory evidence to convict Puiatti. For example. Puiatti and Glock were arrested in Sharilyn Ritchie's stolen car, and the murder weapon was found in the car. Puiatti has failed to show sufficient prejudice as required by *Strickland* resulting from the alleged ineffective

assistance of counsel for counsel's failure to contest the probative value of Puiatti's confessions.

C. *Mens Rea as to Premeditated Murder*

Puiatti argues he was denied effective assistance of counsel when Eble failed to argue that Puiatti lacked the requisite *mens rea* required for premeditated murder. Puiatti argues that he did not have the requisite *mens rea* because he "snapped" and because he acted on an irresistible impulse at the time of the murder. Although Eble argued that Puiatti "snapped," Puiatti alleges that counsel failed to introduce evidence to support that defense. Puiatti claims that Eble did not present supporting evidence because he was not familiar with Puiatti's case, and with the expert witnesses involved. Puiatti asserts that Dr. Delbeato would have testified during the guilt phase that Puiatti was "acting under an irresistible impulse" with an "inability to control his behavior" at the time the murder was committed. Delbeato Aff. ¶ 4, App. 29. Puiatti compares his case to *Magill v. Dugger*, 824 F.2d 879 (11th Cir.1987). in which a defendant succeeded on an ineffective assistance of counsel claim after his counsel failed to argue incapacity to form specific intent.

Had Dr. Delbeato testified that Puiatti was "acting under an irresistible impulse" during the guilt phase of Puiatti's trial, his testimony would not have affected the outcome of the guilt phase of Puiatti's trial because the "irresistible impulse" defense is not a recognized criminal defense in Florida. *Van Eaton v. State*, 205 So.2d 298 (Fla.1967) ("The irresistible impulse rule . . . has never been followed in this jurisdiction.") Similarly, testimony that Puiatti had an "inability to control his behavior" at the time of the murder, which would have supported a diminished

capacity defense, would not have affected the outcome of the guilt phase of Puiatti's trial, as it is well-established in Florida that diminished capacity is not a criminal defense. *Chestnut v. State*, 538 So.2d 820 (Fla.1989) (holding that diminished capacity is not a viable defense). Counsel's failing to raise non-viable Florida criminal defenses does not constitute ineffective assistance of counsel. *See Evans v. State*, 946 So.2d 1 (Fla.2006) ("Counsel cannot be ineffective for failing to seek to introduce evidence of a meritless defense at the guilt phase") (citations omitted).

Further, Puiatti's assertion that *Magill* dictates that Puiatti receive a new guilt phase is incorrect. First, the appellate court did not overturn Magill's conviction, but rather remanded the case for a new penalty phase. Second, *Magill* was tried by the chief of the public defender's office, who decided on the first day of jury selection that he would try the case. Prior to his decision to try the case, the chief of the public defender's office knew only what he had been told about the case. In contrast, Puiatti's counsel were well-apprised of the facts of the case before the start of Puiatti's trial. Counsel's actions in *Magill* were egregious, and yet the appellate court did not disturb the guilty verdict. Certainly, Puiatti has not shown that his counsel's actions with respect to mens rea arguments amounted to ineffective assistance of counsel.[9]

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[9] In addition to the motion to suppress Puiatti's confession, Eble and Garrett filed many of the motions and requests one would expect to be filed prior to the beginning of a capital trial several motions to dismiss; motions for the appointment of psychiatrists, psychologists, and forensics experts; a request for a statement of aggravating circumstances, a motion for production of favorable evidence, a motion for disclosure of search and

D. *Change of Venue*

Puiatti alleges that his counsel's failure to move for a change of venue either before or after voir dire constitutes ineffective assistance of counsel. Puiatti argues that even if Eble did not know that he should move for a change of venue prior to the start of voir dire, he should have known after hearing the responses of the prospective jurors. Puiatti claims that the extensive publicity surrounding the crimes "reached a substantial number of the prospective jurors, actually prejudicing them against Puiatti's innocence." Amended Petition at 33. Puiatti argues that in addition to the pre-trial publicity, publicity during voir dire and the subsequent trial further prejudiced the jury against him.

To prove ineffective assistance of counsel for failure to move for a change of venue, a petitioner must show, "at a minimum, [that] there is a reasonable probability that the trial court would have, or at least should have, granted a motion for change of venue if [petitioner's] counsel had presented such a motion to the court." *Chandler v. McDonough*, 471 F.3d 1360, 1362 (11th Cir.2006) (citation omitted).

The record in this case reflects that 29 of the 53 venire members had knowledge of the case, and two of the seated jurors had been exposed to pretrial publicity. However, a juror's knowledge of an incident is not sufficient support to succeed on a motion for a change of venue:

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seizure; a motion for the appointment of a mental health expert; a motion to empanel a separate jury for the penalty phase of the trial; a motion to sever Puiatti's trial from Glock's, and a motion to increase the number of peremptory challenges.

> Knowledge of the incident because of its notoriety is not, in and of itself, grounds for a change of venue. The test for determining a change of venue is whether the general state of mind of the inhabitants of a community is so infected by knowledge of the incident and accompanying prejudice, bias, and preconceived opinions that jurors could not possibly put these matters out of their minds and try the case solely upon the evidence presented in the courtroom.

Kelley v. State, 212 So.2d 27 (Fla.App.1968). Puiatti has not proven that sufficient bias existed in the jury pool as to warrant a change of venue, and thus has Puiatti not met the burden imposed by Chandler to prove ineffective assistance of counsel. Puiatti has not shown that his counsel's failure to move for a change of venue amounted to ineffective assistance of counsel under *Strickland*.

E. *Voir Dire*

Puiatti argues that he was denied effective assistance of counsel during voir dire. Puiatti alleges that co-counsel Garrett prefaced her questions to potential jurors with the assumption that Puiatti was guilty of first degree murder, effectively admitting Puiatti's guilt and prejudicing potential jurors against him. Further, Puiatti alleges that Garrett repeatedly lost her train of thought and asked confusing and rambling questions of potential jurors. Puiatti points out that the state trial court judge admonished Garrett in his chambers, telling her that "up to now your client has not received effective assistance of counsel." Garrett Aff. ¶ *15, App. 1.*

Contrary to Puiatti's assertions, Garrett did not admit Puiatti's guilt during voir dire, but rather asked

potential jurors whether they would be able to impose the death penalty if Puiatti *were* found guilty. For example, Garrett asked one potential juror: "Assuming as a juror that you agreed with the other jurors and reached a verdict as to first-degree murder, would that verdict as to first-degree murder alone mean to you that you should vote for a certain penalty?" R. 1160. Rather than attempting to select jurors who would find Puiatti not guilty during the guilt phase of the trial, Garrett focused on selecting jurors who would be uncomfortable imposing the death penalty. This strategy was likely chosen because of the wealth of evidence tending to prove Puiatti's guilt. Even if Puiatti were correct that Garrett conceded his guilt, that concession would not amount to ineffective assistance of counsel. In *Florida v. Nixon*, 543 U.S. 175, 192, 125 S.Ct. 551, 160 L.Ed.2d 565 (2004), the United States Supreme Court stated that concession of guilt to first-degree murder does not necessary amount to ineffective assistance of counsel, because "in a capital case, counsel must consider in conjunction both the guilt and penalty-phases in determining how best to proceed." On remand from the United States Supreme Court, the Florida Supreme Court held that "[t]rial counsel was not ineffective for conceding guilt to first-degree murder." *Nixon v. State*, 932 So.2d 1009, 1018 (Fla.2006). Given the large amount of evidence of Puiatti's guilt, it was not unreasonable for Garrett to focus more on the penalty phase of Puiatti's trial than on the guilt phase, hoping to empanel a jury wary of imposing the death penalty. Puiatti has not shown that his counsel's questioning during voir dire amounted to ineffective assistance of counsel under *Strickland*.

F. *Conclusion*

Puiatti has not proven ineffective assistance of counsel during the guilt phase of his trial to meet the *Strickland* standard. Many of the alleged defects in counsel's performance during the guilt phase are premised on arguments which would have failed had they been raised.[10] Although Puiatti's attorneys had not previously tried a capital case, they did not perform below an objective standard of reasonableness during Puiatti's trial. Further, Puiatti has failed to prove that the alleged deficient performance by counsel resulted in an unfair or unreliable outcome, or that the outcome would have been different if counsel had performed the way Puiatti now claims counsel should have performed. Ground Two does not warrant relief.

Ground Four: Ineffective Assistance of Appellate Counsel

Puiatti alleges he was denied effective assistance of appellate counsel when his appellate counsel failed to argue various alleged deficiencies in the guilt phase of Puiatti's trial. Effective assistance of appellate counsel claims are analyzed under the *Strickland* two-prong test. Additionally. "[i]f a legal issue would in all probability have been found to be without merit had counsel raised the issue on direct appeal, the failure of appellate counsel to raise the meritless issue will not render appellate counsel's performance

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[10] The record does not reveal whether Puiatti's counsel failed to raise certain arguments during the guilt phase of Puiatti's trial because Puiatti's counsel they knew would fail, or because counsel were inexperienced Regardless, if Puiatti's counsel committed any error, the error was harmless and did not result in prejudice under *Strickland*

ineffective." *Rutherford v. Moore*, 774 So.2d 637, 643 (Fla.2000) (citation omitted).

A. *Juror Challenges*

Puiatti argues that he was denied effective assistance of appellate counsel because his appellate counsel failed to argue that Puiatti's Constitutional rights were violated when the state trial court judge denied numerous juror challenges for cause. Puiatti alleges that he was forced to use peremptory challenges to remove three jurors who should have been excused for cause, effectively reducing the number of peremptory challenges available to him from ten to seven.[11] Specifically, Puiatti challenges the state trial court's refusing to remove jurors Roller, Withers, and Tucker for cause.

i. Standard of Review for Denying For-Cause Juror Challenges

The state trial court has broad discretion in determining whether to grant or deny a juror challenge for cause, and will not be overturned on appeal absent manifest error. In general, the Florida Supreme Court is highly deferential to the state trial court:

> There is hardly any area of the law in which the trial judge is given more discretion than in ruling on challenges of jurors for cause. Appellate courts consistently recognize that the trial judge who is present in voir dire is in a far superior position to properly evaluate the responses to the questions propounded to the jurors.

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[11] Capital defendants are guaranteed ten peremptory challenges by Florida statute. *See* Fla. R.Crim. P 3.350(a).

Cook v. State, 542 So.2d 964, 969 (Fla.1989). Indeed, a decision not to remove a juror for cause "will not be overturned on appeal absent manifest error." *Overton v. State*, 801 So.2d 877, 889 (Fla.2001) (citing *Van Poyck v. Singletary*, 715 So.2d 930, 931 (Fla.1998)).

Determining whether manifest error exists is a question of reasonableness: "Juror excusals for cause are normally within the trial court's discretion, and a court's ruling will be sustained unless no reasonable person would agree with the court." *Kokal v. Dugger*, 718 So.2d 138, 142-143 (Fla.1998).

i. Juror Roller

Juror Roller told the court she knew the two prosecutors in the case through work, but dealt with them mostly by telephone. Roller told the court that she also knew one of the potential witnesses in the case, Ms. Bass, and several police officers involved in the investigation. Puiatti claims that Juror Roller's relationships with the prosecutors, Ms. Bass, and the police officers involved in the investigation prejudiced her against Puiatti. However, Juror Roller only interacted with the prosecutors and police officers in a professional capacity, and indicated that she did not value their opinions any more or less highly than those of the other individuals involved in the case. When questioned about her ability to impartially weigh the credibility of Ms. Bass as a witness, Roller hesitated, telling the court that her previous knowledge of Ms. Bass could play a role in a determination of credibility. Puiatti moved to have the state trial court excuse Juror Roller for cause, and the court denied the motion. As a result, Puiatti used one of his peremptory challenges to remove Juror Roller.

Puiatti quotes *Singer v. State* and argues that "if there is basis for any reasonable doubt as to any juror's possessing that state of mind which will enable him to render an impartial verdict based solely on the evidence submitted and the law announced at the trial he should be excused on motion of a party, or by the court on its motion." *Singer v. State*, 109 So.2d 7, 23-24 (1959). While Puiatti is correct that Singer found reversible error in the state trial court's denying a motion to remove a prospective juror for cause, *Singer* is distinguishable from Puiatti's case. In Singer, the prospective juror expressed a biased opinion as to the guilt or innocence of the defendant; he admitted to forming an opinion about the case based upon what he had heard and read, and he told the court that he would need to be shown evidence to change that opinion. Essentially, the prospective juror in *Singer* had, in his own mind, shifted the burden of proof to the defendant. In Puiatti's case, however, Juror Roller did not make any statements about the guilt or innocence of Puiatti; she merely admitted to knowing Ms. Bass.

Juror Roller told the state trial court that she would not place any greater emphasis on Ms. Bass's testimony because of their prior relationship, and indicated that she would follow the state trial court's instructions as to witness credibility. R. 1259-60. Roller stated that she would not have any difficulty objectively determining Puiatti's guilt or innocence. R. 1254-55. While prospective jurors' statements relative to their own impartiality are not dispositive of that issue, the statements can quell reasonable doubt as to the impartiality of that juror in the mind of the state trial court judge. The state trial court judge did not abuse his discretion in denying the for-cause challenge to Juror Roller. Therefore, Puiatti's

appellate counsel was not ineffective for failing to raise the argument on appeal.

ii. Juror Withers

During voir dire questioning, Juror Withers was asked whether anything would interfere with his ability to consider the opinions of mental health professionals.[12] Withers responded that he "wouldn't put too much value on what a psychiatrist told [him]." R. 1284. However, Withers told the state trial court that he would objectively follow the judge's instructions, regardless of his personal feelings toward mental health professionals. R. 1282-84. Puiatti moved to excuse Juror Withers for cause, and the state trial court judge denied that motion.

Puiatti's claim as to Juror Withers is cogent only to the penalty phase of Puiatti's trial. Garrett asked Juror Withers about considering mental health experts in mitigation of Puiatti's sentence, not as they related to the guilt phase of Puiatti's trial. Further, no mental health experts testified during the guilt phase of Puiatti's trial.[13] Therefore, if the state trial court judge committed any error in not excusing Juror Withers for cause, the error was harmless. Puiatti's

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[12] Puiatti also argues that Juror Withers equivocated when asked whether he could be fair, indicating he would be "as fair as [he] could be," and stating, "Well, I think I could follow the instructions the judge gives, yes." R. 1279-80. However, these responses did not reflect uncertainty on the part of Juror Withers, but rather ambiguity in Garrett's questions. Juror Withers repeatedly told Garrett that he had difficulty understanding the meaning of her questions. R. 1280-1282

[13] In fact, Puiatti claims in Ground Two that his trial counsel was ineffective for failing to utilize mental health experts to contest *mens rea* during the guilt phase of his trial.

appellate counsel was not ineffective for failing to raise the argument.

iii. Juror Tucker

Juror Tucker revealed during voir dire that he had heard and read previously about Puiatti's case, and remembered many of the details surrounding Puiatti's arrest. When asked whether he had formed an opinion regarding Puiatti's guilt or innocence, Tucker told the court: "[I]t's hard not forming an opinion of some kind under the circumstances . . . I've been wondering quite a bit about that ever since yesterday." *See* R. 1413-16. Puiatti moved to excuse Tucker for cause, and the state trial court judge denied the motion.

Merely showing that a juror has been exposed to details of an alleged crime is not grounds for removing a juror for cause. *Castro v. State*, 644 So.2d 987, 990 (Fla.1994) ("The mere fact that jurors were exposed to pretrial publicity is not enough to raise the presumption of unfairness."). To require all jurors to be completely ignorant of the facts of a case would be to set an impossible standard in high-profile cases such as Puiatti's. The dispositive issue is "whether the jurors can lay aside any opinion or impressions and render a verdict based on the evidence presented in court." *Teffeteller v. Dugger*, 734 So.2d 1009, 1020 (Fla.1999). Juror Tucker was candid with the court in admitting that although he found it difficult to remain unbiased, he nevertheless would do so, and indicated he would have no problem basing a verdict solely on the evidence produced at trial in accordance with the jury instructions. R. 1256. Tucker further told the court that he knew newspaper accounts were often incorrect and biased, and even expressed concern that none of the articles he had read considered

Puiatti's possible innocence. R. 1414-15. The state trial court judge did not abuse his discretion in refusing to excuse Juror Tucker for cause. Therefore, Puiatti's appellate counsel was not ineffective for failing to raise the argument on appeal.

B. *Peremptory Challenges*

Puiatti alleges he was denied effective assistance of appellate counsel when appellate counsel failed to argue that the state trial court judge erred in denying Puiatti's motion for additional peremptory challenges. Puiatti argues that since he was forced to exercise three peremptory challenges to excuse Jurors Roller, Withers and Tucker, he was entitled to three additional peremptory challenges, and that when the state trial court judge denied his motion for the additional peremptory challenges, members of the jury were seated who had "plainly indicated prejudices against Puiatti." Amended Petition at 94. Since the state trial court did not err in refusing to excuse Jurors Roller, Withers and Tucker for cause, Puiatti was not entitled to additional peremptory challenges. This claim is without merit, and Puiatti's appellate counsel was not ineffective for failing to raise the argument.

C. *Questions During Voir Dire*

Puiatti claims that he was deprived of effective assistance of appellate counsel when appellate counsel failed to argue that the state trial court judge improperly sustained objections related to defense counsel's questioning during voir dire. Specifically, Puiatti argues that his trial counsel should have been allowed to ask questions regarding jurors' views on the death penalty. The prosecution repeatedly objected to counsel's questions regarding the death penalty,

and the state trial court judge sustained those objections.[14] Additionally, Puiatti argues that the state trial court judge improperly sustained objections to questions regarding jurors' opinions of mental health experts.

Puiatti first argues that the state trial court improperly sustained an objection to this question: "Do you feel that the death penalty should be the penalty in every murder case?" R. 923-924. While Puiatti is correct that capital defendants have the right to question potential jurors regarding their feelings on the death penalty, *Morgan v. Illinois*, 504 U.S. 719, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992), the objection to this question is sustainable on subject matter grounds. This question did not inquire as to the prospective juror's application of *existing law*; rather, it inquired as to a conception of what laws *should* exist. This kind of question is a normative question. Normative questions on the law are not within the purpose of voir dire, and objections to normative questions are sustainable. *See King v. State*, 390 So.2d 315 (Fla.1980) (finding that a trial judge was within his discretionary authority in sustaining an objection to a normative question on the law), *overruled on other grounds by Strickland v. State*, 437 So.2d 150 (Fla.1983).

Next, Puiatti argues that the state trial court improperly sustained an objection to this question: "Do you have any preconceptions about what would

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[14] It is worth noting that in Ground Two, Puiatti claims that Garrett was ineffective during voir dire, partly because she "elicited multiple sustained objections from the Prosecution." If the prosecution's objections to voir dire questioning regarding the death penalty were not meritorious, Garrett's eliciting them would not constitute ineffective assistance of counsel.

be the appropriate penalty for first-degree murder without knowing more than simply a first-degree murder verdict?" R. 1291. The venierperson being question responded: "I don't understand you," prompting the prosecution's objection as to the form, not the content of the question. This objection was sustainable. Even assuming the objection should not have been granted, any resulting error was harmless, as the juror to whom Garrett asked the question was Juror Roller, who was later peremptorily excused.

Puiatti next asserts that he was unable to ascertain a prospective juror's feelings about the death penalty when the state trial court judge sustained an objection to this question: "[D]o you feel that if Puiatti is guilty of first degree murder, that he should automatically get a sentence of electrocution?" R. 1606. The court sustained the objection because the question did not adequately explain the role of jury instructions as to aggravating and mitigating factors. *Id.* Further, Puiatti's counsel later asked this question of the same juror, and received a response: "[S]ome people do feel that an eye-for-an-eye, tooth-for-a-tooth is the philosophy to follow . . . do you feel that that is your philosophy?" R. 1609. Even if the state trial court judge erred in sustaining the objection as to counsel's initial question, Puiatti's counsel was not deprived of the right to ascertain the prospective juror's views on the death penalty.

Puiatti also argues that the state trial court improperly sustained an objection to this question: "Do you think you'd have difficulty excluding your feelings about psychiatrists?" R. 1284. Even if the state trial court judge abused his discretion in sustaining this objection, Puiatti did not suffer prejudice; Garrett had posed the objected to question to

Juror Withers, who was later peremptorily excused for his views on mental health professionals. [15]

Finally. Puiatti argues that the state trial court judge improperly sustained an objection to a question regarding bias against testimony from family members offered in mitigation of a possible death sentence. As Respondent correctly points out, the prospective juror to whom the question was posed. Juror Heikkinen, was later excused for cause.

Any argument appellate counsel could have made regarding objections during voir dire would not have been meritorious. The objections Puiatti complains of were properly sustained. The record shows that Puiatti was not deprived of his right to question the venire as to their views on the death penalty. Puiatti's appellate counsel was not ineffective for failing to raise this argument.

D. *Involuntariness of Confessions*

Puiatti argues that he was denied effective assistance of appellate counsel when appellate counsel failed to raise on appeal that Puiatti's confessions were involuntary. Puiatti alleges that neither the confession he gave in New Jersey on August 21, 1982, nor the joint confession he gave in Florida on August 24, 1982 was voluntary. Puiatti further alleges that he made the confessions without knowing or under-

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[15] Puiatti objects in Ground Four(a) to the state trial court's refusing to excuse Juror Withers for cause, claiming his views toward mental health pro-fessionals biased him against Puiatti. Puiatti cannot simultaneously claim that (1) Juror Withers should have been excused for cause because of his views on mental health professionals, and (2) that his trial counsel was unable to ascertain Juror Withers's views on mental health professionals.

standing his *Miranda* rights. Puiatti's appellate counsel challenged the admission of the confessions on Fourth Amendment grounds. Puiatti claims that his appellate counsel was ineffective for failing to argue against the admission of the confessions on Fifth, Sixth, and Fourteenth Amendment grounds. However, this claim would not have been successful regard-less of the grounds on which it was raised.

i. Sixth Amendment Right to Counsel

Puiatti claims his appellate counsel should have contested the voluntariness of his confession on Sixth Amendment grounds by alleging that Puiatti was deprived of the right to counsel during his interrogation in New Jersey, rendering his confession inadmissible in Florida. Puiatti alleges that he filled out a form while in custody in New Jersey requesting a lawyer, and that his request was ignored by the New Jersey police. Puiatti did not raise this claim in his Florida state petition for a writ of habeas corpus. The only claims Puiatti raised in his state habeas corpus petition were the involuntariness of his individual and joint confessions, and the alleged delay in his first appearance in New Jersey. Since the Sixth Amendment ineffective assistance of appellate counsel claim was not fairly presented in state court, it is not exhausted, and is procedurally defaulted.

Further, there is ample evidence in the record to suggest that Puiatti was well-informed of his right to counsel, and that he declined to exercise that right. In fact, in the suppression hearing in the Florida state trial court. Puiatti told the state trial court that he never asked the detectives in New Jersey to see a lawyer. R. 716, 719-20. Even after being returned to Florida, Puiatti declined to see the public defender who was waiting at the police station for him. R. 689.

Even if Puiatti's claim were not procedurally defaulted, given the contrary evidence in the record, Puiatti's appellate counsel likely made a strategic decision not to raise the argument. Faced with the Florida Supreme Court's page limit[16], appellate counsel likely focused on the arguments that were most strongly supported by the record. Since there is ample evidence in the record to contradict the Sixth Amendment claim, Puiatti's appellate counsel was not ineffective in failing to raise this argument. *See Strickland*, 466 U.S. at 689, 104 S.Ct. 2052 (holding that courts not find ineffective assistance of counsel when the failure to raise an issue "might be considered sound trial strategy") (citation omitted). Likewise, Puiatti's appellate counsel was not ineffective in failing to raise this argument on Fifth or Fourteenth Amendment grounds.

ii. The New Jersey Confession

Puiatti next argues that the police officers in New Jersey who arrested and detained him violated standard practice by not allowing Puiatti to make a phone call. Puiatti also objects to the fact that he was not taken in front of a judge until several days after his arrest. Puiatti asserts that these violations rendered his New Jersey confession inadmissible in Florida, and appellate counsel failed to effectively argue that inadmissibility. In *Middleton v. State*, 465 So.2d 1218, 1228 (Fla.1985), the Florida Supreme Court heard a claim very similar to Puiatti's:

> We will not consider the correctness of the procedure used by the New York authorities nor of the

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[16] Initial and answer appellate briefs may not exceed fifty pages in Florida. Fla. R.App. P. 9.210.

> effect that a procedural violation would have on admissibility in Florida. At the original trial the court determined that the confession itself was voluntary and admissible. For appellate counsel to decide not to raise the ground of inadmissibility now identified was not a serious defect of performance.

Under *Middleton*, any procedural violations that may have occurred in New Jersey do not bear on the admissibility of the New Jersey confession in Florida because the Florida state trial court found the confession was voluntary and admissible. Therefore, appellate counsel was not ineffective in failing to raise these claims.

iii. The Joint Confession

Finally, Puiatti argues he made the joint confession after a 20-hour trip from New Jersey to Florida, and a subsequent three-to-four-hour interrogation by three detectives. Puiatti alleges that he was sleep-deprived and tired to the point that his joint confession in Florida was involuntary. However, Puiatti testified at the suppression hearing in the state trial court that he felt "[a] little bit tired, but otherwise okay" after he returned to Florida.[17] R. 731. Puiatti has not presented evidence to show that he asked to stop the questioning at any time after arriving in Florida. In the absence of such evidence, there is nothing to suggest that circumstances surrounding Puiatti's joint confession rose to a level rendering the confession

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[17] Puiatti asserts that because he was trans-ported from New Jersey to Florida over a period of 20 hours, he was awake for a 20-hour period However, the record does not show that Puiatti was awake for the entire trip

involuntary. Therefore, Puiatti's appellate counsel was not ineffective for failing to make this argument.

E. Felony Murder

Puiatti argues that he was denied effective assistance of appellate counsel when appellate counsel failed to argue that a felony murder jury instruction was improper. Felony murder, unlike premeditated murder, does not require proof of intent. Puiatti asserts that felony murder must be formally charged by the prosecution to be considered by the jury. The prosecution did not formally charge Puiatti with felony murder in the indictment, but rather requested that a jury instruction on felony murder be included at the close of the trial. Puiatti claims that his primary defense during the guilt phase of his trial-his lack of *mens rea* to commit premeditated murder-was undermined by the state trial court's decision to allow the jury to consider felony murder.

To raise an argument on appeal, that argument must first be presented to the lower court at trial, "and the specific legal argument or ground to be argued on appeal must be part of that presentation." *Archer v. State*, 613 So.2d 446, 448 (Fla.1993). Puiatti's trial counsel did not object to the felony murder jury instruction on the ground that it should have been formally charged by the prosecution and included in the indictment, but rather only complained that there was insufficient evidence of an underlying felony to support felony murder. Therefore, counsel did not preserve an objection on the issue that Puiatti now argues. Absent a properly preserved objection. Puiatti's appellate counsel would have been barred from raising the argument, and had no obligation to raise it. *Wright v. State*, 857 So.2d 861, 875 (Fla.2003) ("Appellate counsel has no obligation to raise issues

on appeal that were not preserved for review.") Therefore. Puiatti's appellate counsel was not ineffective in failing to raise the issue on appeal.

Even if Puiatti's trial counsel had properly objected to the jury instruction, an argument against it would be meritless on appeal because "an indictment charging premeditated murder would permit the state to proceed on either the theory of premeditated murder or felony murder." *Bush v. State*, 461 So.2d 936 (Fla.1984) (citing *Knight v. State*, 338 So.2d 201 (Fla.1976)). Contrary to Puiatti's assertions. Bush does not require the State to mention specifically the theory of felony murder during trial. The State was entitled to a jury instruction on felony murder given the indictment charging premeditated murder. Therefore, even if Puiatti's trial counsel had properly objected to the jury instruction at trial and preserved the claim for appeal, Puiatti's appellate counsel was not ineffective for failing to make this argument.

F. *Conclusion*

Puiatti alleges that his appellate counsel should have made many arguments that are without merit. When crafting appellate arguments, it is important to separate the claims that will likely be meritorious from those that will not. Indeed, the "process of winnowing out weaker arguments on appeal and focusing on those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy." *Smith v. Murray*, 477 U.S. 527, 536, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986) (citation omitted). Puiatti's appellate counsel chose not to raise certain arguments on appeal because he would be unlikely to prevail on those arguments. By focusing on the most meritorious claims, Puiatti's appellate counsel directed the Florida Supreme Court's attention

to the grounds on which Puiatti had the greatest chance of having his conviction overturned. Puiatti's appellate counsel did not perform below objectively reasonable standards, and was not ineffective. Ground Four does not warrant relief.

Ground Seven: Inflammatory Prosecutorial Arguments

Puiatti alleges that the prosecutor made improper arguments during the guilt and penalty phases of his trial, and that the state trial court judge misstated the law in the jury instructions. Puiatti's arguments with respect to the penalty phase of his trial are subsumed by Ground One, as stated above under the Penalty Phase section of this order, and are moot. As to the guilt phase, Puiatti contends that the prosecutor used a prohibited golden-rule argument when he asked the jurors to place themselves in the shoes of the victim. *See Bertolotti v. State*, 476 So.2d 130, 133-34 (Fla.1985) (holding that golden-rule arguments have long been prohibited in Florida). Puiatti also asserts that the prosecutor used inflammatory language to describe the defendants throughout the trial, and specifically made an inflammatory analogy by comparing Puiatti and Glock to hungry wolves in his closing argument. Finally, Puiatti alleges that the judge misstated the law in his jury instructions, suggesting that the jurors could presume premeditation. Puiatti argues that his trial counsel objected to each of these instances of alleged prosecutorial misconduct, and the state trial court erred in overruling his objections. Further, Puiatti repeatedly moved for a mistrial on grounds of prosecutorial misconduct, and alleges that the state trial court erred in denying those motions.

i. Golden Rule Argument

Puiatti is correct that golden-rule arguments are prohibited in Florida. *See Bertolotti*, 476 So.2d at 133-134. A golden-rule argument is "[a] jury argument in which a lawyer asks the jurors to reach a verdict by imagining themselves or someone they care about in the place of the injured plaintiff or crime victim." BLACK'S LAW DICTIONARY 700 (7th ed.1999). Puiatti points to the prosecutor's use of the phrase "any woman's nightmare" to describe what happened to Sharilyn Ritchie as proof that the prosecutor asked the female members of the jury (of which there were five) to put themselves in the victim's shoes. R. 1727. Generally, golden-rule arguments either ask jurors to place themselves in the position of the victim. *Peterson v. State*, 376 So.2d 1230 (Fla. 4th DCA 1979), or ask jurors how they would feel if they were the victims of the alleged crime. *Lucas v. State*, 335 So.2d 566 (Fla. 1st DCA 1976). Merely using the phrase "any woman's nightmare" does not invite the jury to place themselves in the victim's shoes, or consider how they would feel if they were victims of Puiatti's alleged crimes. The statement made by Puiatti's prosecutor was not a golden-rule argument. Indeed, it is difficult to dispute that the alleged crimes would not constitute a nightmare for anyone. The trial court did not err in denying Puiatti's motion for a mistrial and overruling his objections to the alleged golden-rule argument, and no relief is warranted.[18]

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[18] It is worth noting that the Florida Supreme Court found on direct appeal that Puiatti's claims involving prosecutorial misconduct during the guilt phase of his trial "require[d] no discussion." *Puiatti v. State*, 495 So.2d 128, 130 (Fla.1986).

ii. Inflammatory Language and Comparison

Puiatti alleges that the prosecutor made improper inflammatory remarks to the jury throughout the guilt phase of the trial. Specifically, Puiatti objects to this analogy during closing argument: "It's like the hungry wolves circling around a rabbit some place who has no idea what's about to happen, and when the time is right they pounce upon their prey." R. 2122. Puiatti claims that the judge's failure to grant Puiatti's motion for a mistrial is reversible error.

Puiatti asserts that the United States Supreme Court has condemned prosecutorial remarks similar to those of the prosecutor at Puiatti's trial: "The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury." *Darden v. Wainwright*, 477 U.S. 168, 191, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1983) (citing ABA Standards for Criminal Justice 3-5.8(c) (2d ed.1980)). While inflammatory prosecutorial arguments are generally not looked upon favorably by courts, the threshold for establishing reversible error is high: in the Darden case, the court described the prosecutor's improper comments as "a relentless and single-minded attempt to inflame the jury."[19]

The comments of the prosecutor in Puiatti's case did not rise to the level of those of the prosecutor in *Darden*. Indeed, similar petitions for habeas corpus in which prosecutorial comments were even more inflammatory have been denied. *See Cronnon v. State of Ala.*, 587 F.2d 246 (5th Cir.1979) (holding that prosecutorial comments calling the defendant a "fiendish ghoul" who wanted to see the "stark terror on the

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[19] The prosecutor in *Darden* told the jury: "[I wish] that I could see [Darden] sitting here with no face, blown away by a shotgun."

little girl's face" were strong, but warranted by the evidence). The prosecutorial comments during Puiatti's case certainly were strong, but were not unwarranted by the evidence. The state trial court committed no reversible error in denying motions for a mistrial on grounds of prosecutorial misconduct for inflammatory language.

iii. Misstatement of Law

Puiatti alleges that the state trial court judge misstated the law in the jury instructions, leading the jury to believe they could presume premeditation. Specifically, Puiatti objects to this statement:

> The question of premeditation is a question of fact to be determined by you from the evidence. It will be sufficient proof of premeditation if the circumstances of the killing and the conduct of the accused convince you beyond a reasonable doubt of the existence of premeditation at the time of the killing.

R. 2154. Puiatti argues that the this portion of the jury instructions constituted reversible error.

This claim is without merit. If one examines the instruction in context, it is clear that the jury was not misled as to premeditation:

> Before you can find either defendant guilty of first degree premeditated murder, the State must prove the following three elements beyond a reasonable doubt: First is that Sharilyn Ritchie is dead; the second is that the death was caused by the criminal act or agency of Robert Glock or Carl Puiatti; and third is that there was a premeditated killing of Sharilyn Ritchie.
>
> A killing with premeditation is killing after consciously deciding to do so. The decision must be

> present in the mind at the time of the killing. The law does not fix the exact period of time that must pass between the formation of the premeditated intent to kill and the killing. The period of time must be long enough to allow reflection by the defendant, and the premeditated intent to kill must be formed before the killing.
>
> The question of premeditation is a question of fact to be determined by you from the evidence. It will be sufficient proof of premeditation if the circumstances of the killing and the conduct of the accused convince you beyond a reasonable doubt of the existence of premeditation at the time of the killing.

R. 2153-55. Finally, even assuming the jury instruction did mislead the jury, any resulting error was harmless. The overwhelming weight of the evidence supported Puiatti's guilt, including two detailed confessions: one individual confession, and one joint confession. Any harm allegedly caused by the jury instructions does not rise to the level of reversible error.

iv. Conclusion

The portion of Ground Seven that pertains to the guilt phase of Puiatti's trial does not warrant relief.

Ground Eight: The Admission of Glock's Confession

Puiatti alleges that the failure to sever his trial, and the admission of Glock's confession during the guilt phase of the trial violated his Constitutional rights under *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). *Bruton* holds that the admission of a co-defendant's confession deprives a defendant of his rights under the confron-

tation clause of the Sixth Amendment. Puiatti argues that the admission of Glock's confession impermissibly incriminated Puiatti because it indicated that it was Puiatti's idea to kill Sharilyn Ritchie.

Bruton does not control this case, because the confessions given by Puiatti and Glock were substantially consistent with one another, and generally tended to support each other. Puiatti and Glock gave inter-locking confessions. *See Parker v. Randolph*, 442 U.S. 62, 99 S.Ct. 2132, 60 L.Ed.2d 713 (1979); *United States v. Kroesser*, 731 F.2d 1509, 1518 (11th Cir.1984); *Brownlee v. State*, 478 So.2d 467 (Fla. 4th DCA 1985) (establishing that interlocking confessions need not be identical, but need only be consistent with respect to the major elements of the crime or crimes involved). *Bruton* does not require a reversal of a defendant's conviction when the defendant himself has confessed, and his confession "'interlocks' with and supports the confession of his codefendant." *Parker*, 442 U.S. at 64, 99 S.Ct. 2132.

The differences between Puiatti's and Glock's confessions did not bear on Puiatti's guilt or innocence.[20] If the differences were significant at all, they were only significant during the penalty phase, when Puiatti presented his mitigating evidence. Given that no significant differences between Puiatti's and Glock's

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[20] Puiatti argues that the joint confession he and Glock gave in Florida did not resolve the inconsistencies in their individual confessions. Puiatti alleges that Glock never admitted that it was his idea to kill Sharilyn Ritchie. However, Glock did not dispute Puiatti's claim that Glock instigated the killing, effectively acknowledging the truth of Puiatti's statement. Regardless, even if Puiatti is correct that inconsistencies remained in the joint confession, they did not affect the determination of Puiatti's guilt or innocence.

confessions existed as they pertained to the guilt phase of the trial, the confessions were interlocking. Therefore, the state trial court's decision not to sever Puiatti's trial from Glock's did not violate *Bruton*. Ground Eight does not warrant relief.

CONCLUSION

For all the above-stated reasons, the Court:

(1) GRANTS Petitioner's claim that he was denied his Constitutional right to an individualized determination of sentence in a capital case, and finds as moot all other claims relating to the penalty phase of Petitioner's trial. Petitioner's sentence of death is VACATED.

(2) DENIES all claims in the Petition as to the guilt phase.

(3) ORDERS Respondent to conduct a new penalty phase for Petitioner to commence within six months from the date of this Order, or if an appeal is taken from this Order, within six months of the date this Order becomes final.

The clerk is directed to enter judgment for Petitioner as to the penalty phase portion of this Order: to enter judgment for the Respondent as to the guilt phase portion of this order; and to close this case.

CERTIFICATE OF APPEALABILITY

IT IS FURTHER ORDERED that Petitioner is not entitled to a certificate of appealability as to the guilt phase portion of this Order, and that Respondent is not entitled to a certificate of appealability as to the penalty phase portion of this Order.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed Jan 21, 2011]

No. 09-15514-P

CARL PUIATTI,
Petitioner-Appellee,

versus

WALTER A. MCNEIL, Secretary, Florida Department of Corrections,
Respondent-Appellant.

On Appeal from the United States District Court
for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

Before: HULL, PRYOR, and MARTIN, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Frank M. Hull
UNITED STATES CIRCUIT JUDGE

Supreme Court, U.S.
FILED
MAY 24 2011
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Case No. 10-1302

IN THE UNITED STATES SUPREME COURT

CARL PULATTI,
Petitioner,

v.

EDWIN G. BUSS, SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

[Capital Case]

[As Restated]

Should this Court grant review of a case tried in 1984 in which a trial court exercised its discretion to deny a penalty phase severance for two defendants who were properly tried together in the guilt phase, who jointly committed a capital murder, and issued a joint interlocking confession, where resolution of the joinder claim by the state courts and Eleventh Circuit Court of Appeals does not conflict with any other court of appeals and does not present a significant unsettled question of constitutional law?

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The question of whether two properly joined capital defendants found guilty in a joint trial can be sentenced in a joint penalty phase is not an issue which has divided state or federal courts of appeals and does not implicate a serious constitutional question for this Court's review. Further, under the particular facts of this case, the result is not fairly debatable.

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CITATION TO OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at *Puiatti v. McNeil*, 626 F.3d 1283 (11th Cir. 2010).

JURISDICTION

This Court has jurisdiction pursuant to Title 28, United States Code, Section 1254(1) to review the decision of the Eleventh Circuit Court of Appeals. However, Respondent submits that no question contained in the petition is worthy of this Court's consideration.

CONSTITUTIONAL, STATUTORY, AND, PROCEDURAL PROVISIONS INVOLVED

The Respondent generally agrees with Petitioner's statement of relevant constitutional provisions.

STATEMENT OF THE CASE AND FACTS

The State cannot accept the Petitioner's statement of the case as it is primarily composed of argument.

A. State Court Procedural History

Petitioner, Carl Puiatti, along with his co-perpetrator Robert Dewey Glock, was charged by indictment with first degree murder, kidnapping and robbery. Trial by jury resulted in guilty verdicts and death recommendations by a vote of 11 to 1. The trial judge followed the recommendation and sentenced Puiatti to death.

Puiatti's convictions and sentences were affirmed by the Florida Supreme Court in *Puiatti v. State*, 495 So. 2d 128 (Fla. 1986). Puiatti sought certiorari review and this Court vacated and remanded for reconsideration in light of *Cruz v. New York*, 481 U.S. 186, 107 S. Ct. 1714 (1987). *Puiatti v. Florida*, 481 U.S. 1027, 107 S. Ct. 1950 (1987). Following briefs and oral argument, the Court affirmed. *Puiatti v. State*, 521 So. 2d 1106 (Fla. 1987), *cert. denied*, 488 U.S. 871, 109 S. Ct. 184 (1988).

Puiatti pursued post-conviction relief but his claims were summarily denied by the trial court. He pursued an appeal to the Florida Supreme Court and also filed a state petition for writ of habeas corpus. The court affirmed the denial of the 3.850 motion and also denied habeas relief. *Puiatti v. Dugger*, 589 So. 2d 231 (Fla. 1991).

Puiatti, through counsel, filed a series of successive motions for post-conviction relief which were summarily denied. The last successive motion was appealed to the Florida Supreme Court which affirmed the denial of relief. *Puiatti v. State*, 939 So. 2d 1060 (Fla. 2006).

B. Federal Court Procedural History

Puiatti filed his petition for writ of habeas corpus in the Middle District of Florida in April of 1992. The Court administratively closed the case in June of 1995 and reopened the case in March of 1998. The Court granted Petitioner's motion to hold proceedings in abeyance pending disposition of state court proceedings in July of 2002. On May 15, 2008, the District Court reopened the case, dismissing the original petition without prejudice to Puiatti filing an amended petition. On August 14, 2009, the District Court entered an Order granting Petitioner's Amended Petition for Writ of Habeas Corpus, overturning his sentence for the first degree murder of Sharilyn Ritchie. The Court denied the State's motion to alter or amend on October 15, 2009.

The State appealed and the Eleventh Circuit Court of Appeals reversed the district court in an opinion issued on November 29, 2010. *Puiatti v. McNeil*, 626 F.3d 1283, 1317-1318 (11th Cir. 2010).

C. Relevant Facts

i) Trial

In upholding the convictions and death sentences, the Florida Supreme Court set forth the following factual summary:

> Carl Puiatti and Robert D. Glock appeal their convictions for first-degree murder, kidnapping, and robbery, and their death sentences imposed by the trial judge in accordance with the jury's recommendation. We have jurisdiction, article V, section 3(b)(1), Florida Constitution, and we affirm the convictions and the death sentences.
>
> The trial record reflects that on August 16, 1983, the woman victim arrived at a Bradenton shopping mall. As she exited her automobile, Puiatti and Glock confronted her, forced her back inside the car, and drove away with her. They took $50 from her purse and coerced her into cashing a $100 check at her bank. They then took the victim to an orange grove outside Dade City where they took the woman's wedding ring and abandoned her at the roadside. After traveling a short distance, the appellants determined that the woman should be killed, and they returned in the car to her. When the

car's window came adjacent to the woman, Puiatti shot her twice. The appellants drove away, but, when they saw she was still standing, they drove by the victim again and Glock shot her. When the woman did not fall, the appellants made a third pass with the automobile, Glock shot her another time, and the woman collapsed.

Four days later, a New Jersey state trooper stopped the victim's vehicle because its license plate was improperly displayed. Puiatti and Glock occupied the automobile. When neither appellant could present a valid driver's license, the officer requested the car's registration. As Puiatti opened the glove box, the trooper saw a handgun. The officer seized that handgun, searched the vehicle, and uncovered another handgun. He then arrested both men for possession of handguns without permits. The police later identified the handgun from the glove box as the murder weapon.

The next day Puiatti and Glock individually confessed to the kidnapping, robbery, and killing. These initial confessions varied only to the extent that each blamed the other as instigator of the killing and each offered a differing sequence of who fired the

> shots at the victim. Each confessor admitted he had fired shots at the victim. Three days later, on August 24, Puiatti and Glock gave a joint statement concerning their involvement in the murder. In this joint confession, the appellants resolved the inconsistencies in their prior statements: they agreed that Glock initially suggested shooting the victim and that Puiatti fired the first shots and Glock fired the final shots

Puiatti v. State, 495 So. 2d 128, 129 (Fla. 1986).

The Eleventh Circuit's opinion, quoted the joint confession, in which Puiatti and Glock recounted their roles [quoted in part]:

> Detective Stahl asked Puiatti to describe the incident:
>
> ....
>
> We walked to a Shop and Go Store near Bradenton and called a taxicab to take us to the mall. We got to the mall about 8:00 o'clock that morning, and, uh, hung around until it opened. And that day we watched a couple of movies in the mall and we were kind of looking around in the parking lot for a customer to come in to try to get their car. We had no luck that day.

That night, later that night, we tried to hitchhike out of town and tried for a couple of hours, and it was about 1:00 o'clock in the morning and we had no luck. So there was a truck parked over by the mall and it was open, so we went in and slept for a few hours until that morning.

....

Okay. The following morning, which was Tuesday, the 16th, we went and got something to eat. And we were getting very low on money, so we waited around the mall parking lot until it opened again. And I'm not sure of the exact time.

Do you remember the time when she came?

....

Mr. Glock: It was approximately 10:20-10:30.

Mr. Puiatti: About 10:30 that morning a woman pulled into the mall parking lot in ... an orange 1977 Toyota SR-5 Corolla. That's what it was, Corolla.

At that time when she pulled in she had opened the door and started to get out of the car, and Robert had a handbag with a .38 in it and went up to her, put the gun on her, and she started to scream. And he told her to get in the backseat.

At that time I got in the car and started—and got behind the driver's wheel and started to pull out of the mall.

At that time Robert went through her purse and found fifty dollars and also found that she had a, uh, bank account. So she's offering to go to her bank and withdraw some money for us, and we—so we went to the Palmetto Bank on Palmetto Avenue and withdrew a hundred dollars in four twenties and two tens. She wrote out a check, and we went through the drive-through and withdrew it.

Puiatti said that he drove the car northbound until he found a dirt road through orange groves near Dade City, Florida. Puiatti drove the car through the dirt road until he saw a street, then turned around and stopped the car about halfway down the dirt road. Puiatti said they let Ritchie out of the car and, at her request, gave Ritchie her

purse and her husband's baseball glove They took her wedding band and diamond ring.

Puiatti and Glock jointly described how Glock suggested shooting Ritchie, how Puiatti fired the first two shots, and then Glock fired the rest, as follows:

By Detective Stahl: Question: Then what happened when you let her out of the car?

Mr. Puiatti: Okay. We left her and started to take off. And as we were taking off, we started talking back and forth, and *Robert said to me that he thought that we should shoot her.* And after going back and forth a little bit, I agreed, and turned the car around.

Then we drove up next to her and acted like we were looking for directions, and I shot her in the right—right by the right shoulder, and drove off.

When I was driving off, Robert noticed that she was still standing.

Mr. Glock: There were two shots fired at her, and then—interrupted—

Mr. Puiatti: You tell it.

Mr Glock: *When we first turned around and came back toward her on the first time, he shot the first time and hit her in the shoulder, the right shoulder, and then fired a second time. I don't know if the second time he hit her or that was when he missed her and hit the tree or whatever.*

Mr. Puiatti: Yeah.

Mr. Glock: *I don't know if he missed the second shot or not.*

Mr. Puiatti: *Yeah. It was because*— interrupted—

By Detective Stahl: *Question: You agree with that, Carl?*

Mr. Puiatti: Yeah.

Question: Go ahead, Bobby.

Mr. Glock: Then we kept on driving, and I noticed that she was still standing. Carl turned around and handed me the gun at that time and drove back by her, and I fired a shot. No, I fired two shots at that time.

Mr. Puiatti: Yeah.

Mr. Glock: I fired two shots. Uh, then we kept on driving back by, turned around again, (pausing).

Mr. Puiatti: Went back by again, stopped, (pausing).

Mr. Glock: Yeah. Stopped and turned around and headed back toward her.

Mr. Puiatti: (Affirmative nod.)

Detective Wiggins: She was still standing?

Mr. Glock: I only fired one shot at that time. Only fired two shots the whole time.

Mr. Puiatti: Three.

By Detective Stahl: Question: I just want to interrupt you. *Carl, at the time when you said you shot her once in the shoulder, then you shot in the chest; didn't you?*

Mr. Puiatti: Yes, I shot her twice.

Mr. Glock: *It was the third shot that you missed.*

Mr. Puiatti: *So those first two, yeah.*

Question: *So you shot her twice, Carl.*

Mr. Puiatti: Yes.

Question: Once in the shoulder, you said (interrupted).

Mr. Puiatti: And once in the chest area.

Question: Chest. And how many times—how many shots did you—(interrupted.)

Mr. Glock: Two.

Question: So how many shots in total did you fire?

Mr. Glock: Me?

Question: Yeah.

Mr. Glock: Two.

Question: And—(pausing)

Mr. Puiatti: Altogether, five. One missed.

Question: One missed. So that was a total of five shots?

Mr. Glock: The sixth shot got hung up in the gun and we didn't worry about it.

Question: Okay. And how many times did you go back now?

Mr. Glock: We passed by her once—twice—three times.

Question: Three times you went back *and on the third time what happened?*

Mr. Glock: That's when I fired my second and final shot, and that's when she—as we were driving away after the last shot, she fell over.

Mr. Puiatti: She walked about ten yards and then fell over.

(Emphasis added).

Puiatti v. McNeil, 626 F.3d at 1288-1290.

The jury recommended death by 11-1 and the trial court followed the jury's recommendation. The court found three aggravating circumstances, that the murder was committed to avoid arrest, the murder was committed for pecuniary gain, and that the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. *Puiatti v. State*, 495 So. 2d at 130.

ii) Relevant State Court Legal Rulings

Severance

On his direct appeal to the Florida Supreme Court Petitioner asserted that the trial court abused its discretion in failing to sever his trial and penalty phase from his co-defendant, Glock. In rejecting this claim with regard to the penalty phase severance, the Florida Supreme Court stated:

> *Puiatti's Penalty Phase*
>
> Puiatti challenges his sentence of death by asserting five reversible errors during his penalty proceeding. First, he claims that the trial court's denial of a severance in the penalty phase prejudiced him, arguing that Glock presented antagonistic arguments on the aggravating circumstance of substantial domination and that the jury was exposed to improper instructions and prosecutorial argument relating to the non-existence of the mitigating factor of no significant prior criminal history. We hold that a severance was not required in the penalty phase of the trial. As to the alleged conflict concerning which defendant dominated the other, our decision in *McCray* disposes of this contention. In *McCray* we stated:

> [T]he fact that the defendant might have a better chance of acquittal or a strategic advantage if tried separately does not establish the right to a severance. Nor is hostility among defendants, or an attempt by one defendant to escape punishment by throwing the blame on a codefendant, a sufficient reason, by itself, to require severance. If the defendants engage in a swearing match as to who did what, the jury should resolve the conflicts and determine the truth of the matter.

416 So. 2d at 806 (citations omitted). *See also Dean v. State*, 478 So. 2d 38 (Fla. 1985). Further, we find the mere fact that only one of two codefendants has a significant prior criminal history does not require, in and of itself, a severance in the trial's penalty phase. The critical question is whether the jury was able to consider evidence presented by each defendant during the penalty phase and apply the law without being unduly confused or prejudiced. We find that, under the circumstances of this case, the jury could properly apply the facts to the law without confusion or prejudice.

Puiatti v. State, 495 So. 2d at 131.

iii) Relevant Federal Court Rulings

The District Court, issued an opinion, finding that although Puiatti and Glock were properly jointed for trial in the guilt phase, the state trial court erred in failing to grant a penalty phase severance and granted habeas relief. The 11th Circuit Court of Appeals reversed the district court, concluding that neither the 8th Amendment in general nor the particular facts of this case required severance. The court stated in part:

> The bottom line is Puiatti's prejudice claim essentially rests upon an implicit contention that a separate penalty trial is required whenever a co-defendant's presence might reduce a defendant's chance to avoid a death sentence. We have found nothing in severance law or Eighth Amendment jurisprudence to support this position. *See Zafiro*, 506 U.S. at 540, 113 S.Ct. at 938 (stating that "it is well settled that defendants are not entitled to severance merely because they may have a better chance of acquittal in separate trials"). Puiatti has failed to show any specific way that he was prejudiced by being tried jointly with Glock at the penalty phase.
>
> Indeed, the specific facts of this case made a joint penalty phase particularly appropriate. Puiatti and Glock acted together in planning and effecting the

abduction, robbery, and murder of Ritchie. Both Puiatti and Glock fired shots at Ritchie. It was Puiatti who was the first to fire shots at and strike the helpless victim from close range. Puiatti and Glock issued a joint interlocking confession that agreed on how many shots were fired, who fired each of them, and when. Puiatti and Glock kept driving by and shooting Ritchie until they were sure she would die. As the state trial court aptly noted, this case is a "classic example of why joint defendants ought to be [tried] together in order to get justice."

In fact, Puiatti's joint trial with Glock avoided the inequity of inconsistent verdicts and one capital defendant going second with the benefits of previewing the State's evidence and arguments. *See Richardson*, 481 U.S. at 210, 107 S.Ct. at 1708–09 (stating, "Joint trials generally serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts" and by not "randomly favoring the last-tried defendants who have the advantage of knowing the prosecution's case beforehand"). The *Lockett–Eddings–Penry–Abdul–Kabir* principle that the sentencer must be allowed to consider and give effect to "all relevant

> mitigating evidence," *see Eddings*, 455 U.S. at 117, 102 S.Ct. at 878, is quite compatible with a joint trial. To the extent any arguable tension may exist between joint trials and individualized sentencing, it did not occur here. *See Bernard*, 299 F.3d at 475 (noting potential tension between joinder and a defendant's right to an individualized capital sentencing decision, but affirming defendant's death sentence in a joint trial).
>
> If any two capital co-defendants could be properly joined in a penalty phase, it was Puiatti and Glock. Puiatti has not shown that his severance denial violated any constitutional right.

Puiatti, 626 F.3d at 1317-1318.

REASONS FOR DENYING THE WRIT

The question of whether two properly joined capital defendants found guilty in a joint trial can be sentenced in a joint penalty phase is not an issue which has divided state or federal courts of appeals and does not implicate a serious constitutional question for this Court's review. Further, under the particular facts of this case, the result is not fairly debatable.

Petitioner argues that this Court should review the Eleventh Circuit's decision denying his writ of habeas corpus on the basis of penalty phase severance. There is no conflict between the Eleventh Circuit and any other court of appeals. Moreover, the underlying state court decision is a presumptively valid fact based decision which does not present any conflict with this Court's precedent. Accordingly, the petition should be denied. See, Rule 10, Supreme Court Rules of Practice and Procedure (Certiorari review appropriate for cases which decide an "important question of federal law" which represent a conflict with relevant decisions of this Court, between United States courts of appeals, among state courts of last resort, or, present "a significant unsettled question" for this Court).

A. This Claim Was Not Properly Exhausted In State Court

The Eleventh Circuit assumed "for purposes of this opinion only that Puiatti exhausted this claim because it lacks merit in any event." *Puiatti*, 626 F.3d at 1308. The Respondent does not concede that this claim was properly exhausted in state court and argued exhaustion and procedural bar in its habeas response in the district court and on appeal to the Eleventh Circuit. Puiatti's direct appeal argument to the Florida Supreme Court did not mention, much less assert an Eighth Amendment fair and individualized sentencing claim. Nor, for that matter, did Puiatti's brief on direct appeal mention most of the supporting allegations of prejudice [opening argument and presentation of witnesses, Puiatti's failure to testify, and the Prosecutor's closing and jury instructions] argued here as grounds for habeas relief. The claim raised in federal court and for which Puiatti seeks review in this Court bears little resemblance to the claim presented in state court. (A1-A13: Excerpt, Puiatti's Direct Appeal Brief, Issue I, pgs. 9-18). See, *Picard v. Connor*, 404 U.S. 270, 275, 92 S. Ct. 509, 512 (1971) ("We emphasize that the federal claim must be fairly presented to the state courts.").

B. A Trial Judge Has Considerable Discretion To Rule On Whether Severance Is Necessary And The Fact Dependent Exercise Of Such Discretion Does Not Offend Any Constitutional Principle And Has Not Engendered Conflict Among Federal Or State Appellate Courts

There is no binding, or, for that matter, even persuasive legal precedent existing now, much less when this case became final in 1986, which suggests the state trial court abused its broad discretion in refusing to sever Puiatti's penalty phase from that of his co-defendant Bobby Glock. Indeed, joint trials and penalty phases are not disfavored by state law, or, more importantly, for this Court, federal constitutional law. As noted by this Court in *Richardson v. Marsh*, 481 U.S. 200, 209-210, 107 S. Ct. 1702, 1708-1709 (1987): "...It would impair both the efficiency and the fairness of the criminal justice system to require, in all these cases of joint crimes where incriminating statements exist, that prosecutors bring separate proceedings, presenting the same evidence again and again, requiring victims and witnesses to repeat the inconvenience (and sometimes trauma) of testifying, and randomly favoring the last-tried defendants who have the advantage of knowing the prosecution's case beforehand." See, *Maxwell v. Wainwright*, 490 So. 2d 927, 933 (Fla. 1986) ("Where co-defendants are tried together on a capital charge, there being no ground for a severance of the guilt-or-innocence phase of the trial, it is proper for the court to proceed with a joint sentencing trial so that the same jury that heard all

the guilt-phase evidence can consider and weigh the relative roles and culpability of the offenders.").

Addressing an allegation of Constitutional error surrounding the joint trial of a capital and non-capital defendant, this Court again noted the preference for joint trials:

> [] In joint trials, the jury obtains a more complete view of all the acts underlying the charges than would be possible in separate trials. From such a perspective, it may be able to arrive more reliably at its conclusions regarding the guilt or innocence of a particular defendant and to assign fairly the respective responsibilities of each defendant in the sentencing. See ABA Standards for Criminal Justice Standard 13-2.2 (2d ed. 1980). This jury perspective is particularly significant where, as here, all the crimes charged against the joined defendants arise out of one chain of events, where there is a single victim, and where, in fact, the defendants are indicted on several of the same counts.

Buchanan v. Kentucky, 483 U.S. 402, 418, 107 S. Ct. 2906, 2915 (1987) (emphasis added).

The defendants committed the murder, robbery and kidnapping of Mrs. Ritchie together, issued a joint confession, and their roles in the murder were not in dispute. The defendants were close in age, and

there was no vast disparity in either the quality or quantity of mitigating evidence. There was simply no compelling reason for the trial court to order a separate penalty phase for each defendant.

Petitioner acknowledges that federal law and the overwhelming majority of states provide for joint sentencing in capital cases.[1] (Cert. Pet. at 17). Nonetheless, Petitioner attempts to manufacture some type of conflict or "tension" in the law based upon two courts of appeals cases he suggests are inconsistent with the Eleventh Circuit's opinion in this case. These cases, as explained below, do not suggest, much less establish a conflict among courts of appeals.

Petitioner cites no case in which a court of appeals has reversed a state court on the question of penalty phase severance. The claim Puiatti presents for review simply has not been the subject of controversy among federal or state courts. Rarely have appellate courts reversed trial judges for refusal to sever a guilt or penalty phase for jointly tried defendants. See, e g., *Zafiro v. United States*, 506 U.S. 534, 538-39, 113 S. Ct. 933 (1993) ("Rule 14 does not require severance even if prejudice is shown; rather, it leaves the tailoring of the relief to be granted, if any, to the district court's sound discretion."); *In re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d 93, 130-135 (2nd Cir. 2008) (finding no abuse of

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[1] Under Florida law, the jury that heard the guilt phase of the capital case also recommends the appropriate penalty *Maxwell v. Wainwright*, 490 So. 2d at 933; *McCray v. State*, 416 So. 2d 804 (Fla. 1982).

discretion from District Court's denial of El-Hage's motion to sever his trial from the trial of his death-eligible co-defendants, finding the record demonstrates a lack of prejudice "let alone prejudice sufficient to trigger the granting of a new trial, due to his joint trial with these co-defendants."); *People v. Burney*, 47 Cal. 4th 203, 256, 212 P.3d 639, 683, 97 Cal. Rptr.3d 348, 400-401 (Cal. 2009) (rejecting penalty phase severance claim where defendant argued he was prejudiced by "joinder of the trial of the three defendants, and the admission of the codefendants' statements, permitted the prosecutor to refer repeatedly to defendant's primary role in the murder."); *U.S. v. Tipton*, 90 F.3d 861, 892-893 (4th Circ. 1996) (while noting "the threat posed to individualized" sentencing from a joint penalty phase the court found no abuse of discretion on severance based upon repeated instructions to give "individualized consideration" to each defendant); *Com. v. Romero*, 595 Pa. 275, 307, 938 A.2d 362, 381 (Pa. 2007) (no abuse of discretion shown in denying penalty phase severance); *U.S. v. Rivera*, 363 F.Supp.2d 814, 822-825 (E.D. Va. 2005) (disposing of arguments against severance and the alleged threat to "individualized" sentencing noting that the "jury is being asked to make a judgment about group conduct and a joint trial will allow them to fairly judge the appropriate level of responsibility of each defendant.").

Puiatti cites *U.S. v. Tipton*, 90 F.3d 861, 892 (4th Cir. 1996) and *U.S. v. Bernard*, 299 F.3d 467, 475 (5th Cir. 2002) in his effort to find conflict or "tension" in the law. However, even a cursory review

of the fourth and fifth circuit opinions in those cases reveal that they are consistent with the Eleventh Circuit's decision in Puiatti's case. In each case, the court of appeals upheld joint capital penalty phase proceedings.

In *Tipton*, the Court affirmed the trial court's exercise of discretion in refusing to sever the penalty phases for three defendants. The court concluded, in part:

> Reviewing under that standard, we cannot find abuse of discretion here. The concerns raised by appellants are legitimate ones. But there are countervailing considerations that properly may be weighed in the discretionary balance. Because the relevant statutory provision, § 848(i)(1)(A), requires that, except in situations not present here, the penalty hearing shall be conducted before the same jury that determined guilt, severance here would have required three separate, largely repetitive penalty hearings before this jury. The same considerations of efficiency and fairness to the Government (and possibly the accused as well) that militate in favor of joint trials of jointly-charged defendants in the guilt phase, *see Lockhart v. McCree*, 476 U.S. 162, 181, 106 S.Ct. 1758, 1769, 90 L.Ed.2d 137 (1986); *Richardson v. Marsh*, 481

> U.S. 200, 210, 107 S.Ct. 1702, 1708-09, 95 L.Ed.2d 176 (1987), must remain generally in play at the penalty phase. The district court was therefore entitled to weigh those considerations in the balance.

Tipton, 90 F.3d at 892.

Similarly, the Fourth Circuit found no clear error in the failure to sever a capital defendant's penalty phase in *U.S. v. Bernard*, 299 F.3d 467, 475 (5th Cir. 2002). The court noted that severance lies in the trial court's discretion and citing *Zafiro v. United States*, [cite omitted] held that the "pro-Bernard mitigating evidence of which Vialva complains was not sufficiently 'mutually antagonistic' or 'irreconcilable' to him to suggest, much less compel, severance at the penalty phase." *Bernard*, 299 F 3d at 475.

The very few cases supporting severance represent nothing more than fact specific exercises of judicial discretion. Upon review, such cases do not conflict with the Eleventh Circuit's opinion in this case.

For example, in *U.S. v. Catalan-Roman*, 376 F.Supp 2d 96 (D.P.R. 2005), cited by Petitioner, the district court exercised its discretion in ordering a sequential penalty phase before the same jury for two capital defendants who had been convicted of murder in a joint trial. The district court in *Catalan-Roman* noted that the prosecution's theory of responsibility

between the two defendants favored "one defendant more than the other" and the "affected defendant" claimed he would "bring information to cast doubt as to the Government's version of facts" to show "how more culpable his co-defendant was." Moreover, this factor in favor of severance was coupled with a perceived vast disparity in quantity and quality of mitigation evidence between the two defendants:

> Lastly, during the *ex parte in camera* hearing, Mr. West [Medina's counsel] stressed the high risk dilution of Medina's mitigating information in light of Catalan's very powerful mitigation regarding his good behavior before and after he was arrested. Because of Medina's lack of commensurate mitigation, Mr. West claimed that continuing with a joint penalty trial would overshadow Medina's right to an individualized determination because the jury would be unable to forgo comparing the two defendants.

Catalan-Roman, 376 F.Supp.2d at 106.

Catalan-Roman is easily distinguished from the instant case. First, *Catalan-Roman* was a federal district court exercising its own discretion on a motion to sever capital co-defendants, not a district court resolving a habeas claim for a presumptively valid state court sentence for which a federal court must accord deference. Moreover, the court in *Catalan-Roman* was faced with a much different factual scenario, where the Government was pointing

the finger at one defendant as the shooter and the individual most responsible for the capital murder. Here, there is a joint confession, in which Petitioner did most of the talking, which specified each defendant's role and established equal culpability in the victim's murder. Further, *sub judice*, there was not a vast or even appreciable difference in the quantity or quality of the mitigating evidence presented by the defendants as in *Catalan-Roman*. Finally, despite the concerns in *Catalan-Roman*, the court did not order a separate jury to hear each case, rather it ordered a sequential proceeding, thereby allowing the guilt phase jury to determine the appropriate sentence for each defendant.[2]

Puiatti argues that joint sentencing proceedings in this case violate the fair and individualized sentencing this Court held was necessary for a capital defendant in *Lockett v. Ohio*, 438 U.S. 586, 98 S. Ct. 2954 (1978). Puiatti appears to be asking this Court to announce a new rule based upon a novel and in the Respondent's view, an unnatural expansion of *Lockett*. Extending *Lockett* to preclude or inhibit joint sentencing would divest state and federal trial judges of discretion on the severance issue in capital cases. Critically, Puiatti has failed to establish that a single court of appeals or state court has interpreted this Court's decision in *Lockett* to preclude joint sentencing for two defendants who

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[2] In *U.S. v. Henderson*, 442 F.Supp.2d 159 (S.D.N.Y. 2006), the district court denied the motion to empanel a separate penalty phase jury for each defendant and exercised its discretion to order sequential sentencing, a remedy advocated by the Government.

were properly tried together in the guilt phase. Thus, there is no conflict in the law worthy of this Court's consideration in this case.

The Eleventh Circuit properly recognized in affirming the rulings of the state courts below, that *Lockett* did not address joint sentencing of capital defendants. The Eleventh Circuit did not, as Puiatti repeatedly suggests, assert that a capital defendant is not entitled to a fair or individualized sentencing. The court did, however, recognize that *Lockett* does no more than prevent a court from limiting the mitigating evidence a defendant may present or by its instructions impermissibly preclude a jury from considering a defendant's mitigating evidence.[3] The Eleventh Circuit did not misinterpret *Lockett*. In *Johnson v. Texas*, 509 U.S. 350, 113 S. Ct. 2658 (1993), this Court emphasized that *Lockett* and its progeny "stand only for the proposition that a State may not cut off in an absolute manner the presentation of mitigating evidence, either by statute or judicial instruction, or by limiting the inquiries to which it is relevant so severely that the evidence could never be part of the sentencing decision at all." *Johnson*, 509 U.S. at 368.

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[3] As stated by the Eleventh Circuit: " . . although Puiatti attempts to connect and intertwine severance with his constitutional right to an individualized sentencing determination, we can locate, and Puiatti has cited, no Supreme Court decision doing so. *Lockett* and its progeny do not address joint penalty phases or say that the presence of a co-defendant at a capital defendant's penalty phase trial has any Eighth Amendment implications whatsoever. None of the *Lockett* line of cases relates to severance or helps Puiatti's claim at all." Puiatti, 626 F.3d at 1314-1315.

The Eleventh Circuit specifically found that Puiatti was not limited in his presentation of mitigating evidence, nor, was the jury limited by instructions from considering any mitigating evidence submitted by Puiatti during his joint penalty phase with Glock. The Eleventh Circuit stated:

> First, Puiatti was not prevented from presenting any mitigating evidence. Puiatti has not proffered a single piece of evidence he was unable to put before the jury or judge for consideration by virtue of the joint penalty phase.
>
> Second, no state statute nor judicial interpretation nor jury instruction restricted the jury or judge from considering, or acting upon, Puiatti's mitigation evidence. Rather, the Florida trial court appropriately instructed the jury during the penalty phase to carefully weigh and consider "all of" the evidence presented, stating, "Before you ballot you should carefully weigh, sift and consider the evidence, and all of it, realizing that human life is at stake, and you should bring to bear your best judgment in reaching your advisory sentence."

> The state trial court also instructed the jury about the potential sentences for Glock and Puiatti separately and individually. FN29 [omitted] "Jurors routinely serve as impartial factfinders in cases that involve sensitive, even life-and-death matters" and "[i]n those cases, as in all cases, juries are presumed to follow the court's instructions." *Hammond v. Hall*, 586 F.3d 1289, 1334 (11th Cir. 2009) (quoting *CSX Transp., Inc. v. Hensley*, -- -- U.S. ----, 129 S.Ct. 2139, 2141, 173 L.Ed.2d 1184 (2009)). Courts presume that the jury heard, understood, and followed the court's instructions. *Richardson*, 481 U.S. at 208-11, 107 S.Ct. at 1708-09.

Puiatti, 626 F.3d at 1314-1315.

Assuming for a moment this Court were to entertain Petitioner's invitation to interpret or extend *Lockett* to inhibit or preclude joint penalty phases in capital cases, announcing such a rule and applying it to a case which has been final for more than twenty years would violate *Teague v. Lane*, 489 U.S. 288, 311, 109 S. Ct. 1060, 1075 (1989). *Teague* held that constitutional claims may not be raised on collateral review if they are based upon a new rule that was announced after the conviction and sentence became final. 489 U.S. at 311. This Court has explained that *Teague* validates reasonable good faith interpretations of existing precedent. *Butler v.*

McKellar, 494 U.S. 407, 110 S. Ct. 1212 (1990). Precedent existing at the time of trial did not suggest, much less require a separate penalty phase for defendants who were properly joined for trial in the guilt phase.[4] See, *Gutierrez v. Dretke*, 392 F.Supp.2d 802, 829 (W.D. Tex. 2005) ("Insofar as petitioner argues the Eighth Amendment compels a state trial court to hold a separate trial on punishment for every capital murder defendant found guilty with other defendants of participating in the same capital murder, respondent correctly points out that this Court is foreclosed from recognizing such a new rule in this habeas corpus proceeding by the non-retroactivity doctrine of *Teague v. Lane*, 489 U.S. 288, 310, 109 S.Ct. 1060, 1075, 103 L.Ed.2d 334 (1989).").

The Eleventh Circuit in this case properly credited the assessment of the state trial court below that severance was not required in order for Puiatti and Glock to receive a fair penalty phase. The exercise of such judicial discretion, under the particular facts of this case, does not offend any

---

[4] The State did not waive a *Teague* bar. It was timely presented in a 60(b) motion when it appeared the district court was essentially interpreting or extending *Lockett* to preclude joint capital penalty phase proceedings. The State argued a *Teague* bar in its 11th Circuit initial brief. The Eleventh Circuit, however, did not address the *Teague* bar. The State did not below and does not now waive reliance upon *Teague*. See, *Schiro v. Farley*, 510 U.S. 222, 228-229, 114 S. Ct. 783, 788-789 (1994) (noting that the State may generally argue any legal theory to support the lower court judgment but declining to apply the *Teague* bar when it was argued for the first time on the merits where the State failed to raise this bar in its response to the certiorari petition)

constitutional principle. Petitioner has not cited any conflicting authority from this Court, other courts of appeals, or state courts to support certiorari review. See *Rockford Life Insurance Co. v. Illinois Department of Revenue*, 482 U.S. 182, 184, n. 3 (1987) (noting that cases which have not divided the federal or state courts or presented important, unsettled questions of federal law do not usually merit certiorari review). Accordingly, certiorari should be denied.

C. The Eleventh Circuit's Decision On Severance Is Supported by The Record, Is Wholly Dependent On The Particular Facts Of This Case, And Is Of Significance To No One Other Than The Parties To This Litigation.

Petitioner is asking this Court to review and reverse the Eleventh Circuit decision affirming the state trial judge's exercise of discretion [affirmed by the Florida Supreme Court] in denying a penalty phase severance for Glock and Puiatti. As an exercise of judicial discretion by the state trial judge on habeas review, this decision is wholly dependent on the facts of the case and of significance to no one other than the parties to this litigation. See, *U.S. v. Johnston*, 268 U.S. 220, 227, 45 S. Ct. 496, 497 (1925) ("We do not grant certiorari to review evidence and discuss specific facts."). Consequently, this Court should decline to exercise certiorari jurisdiction over this case. See, *Chevron U.S.A., Inc. v. Sheffield*, 471 U.S. 1140, 105 S. Ct. 2686 (1985); *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 75 S. Ct. 614 (1955); *Layne & Bowler Corp. v. Western Well*

Works, 261 U.S. 387, 43 S. Ct. 422 (1923). Moreover, a review of the Eleventh Circuit's detailed opinion accompanying the denial of this claim establishes correct application of this Court's precedent.

An abuse of the trial court's discretion cannot be found on the basis of this record, much less a serious constitutional error requiring grant of the writ. See, *Johnson v. Dugger*, 817 F.2d 726, 728 (11th Cir. 1987) (Regardless of the state law governing severance in state trials, a federal court will not grant relief to a habeas petitioner on this issue unless he can establish that the failure to grant severance rendered the trial "fundamentally unfair."). As found by the Eleventh Circuit below, "[i]f any two defendants could be properly joined in a penalty phase, it was Puiatti and Glock." *Puiatti*, 626 F.3d at 1318. The defendants committed the murder, robbery and kidnapping of Mrs. Ritchie together, issued a joint confession, and their roles in the murder were not in dispute. The defendants were close in age, and there was no vast disparity in either the quality or quantity of mitigating evidence. There was simply no compelling reason for the trial court to grant a separate penalty phase for each defendant. The grounds alleged by Puiatti in support of severance are either not supported by the record, not persuasive, or simply insufficient to support finding an abuse of discretion in this case, much less a serious constitutional error.

Puiatti and Glock did not pursue materially inconsistent penalty phase theories. They were both classified as followers and unlikely to commit the crime if they were alone. Significantly, Dr. Mussenden, Glock's mental health expert, did not assert that Glock was under the influence or domination of Puiatti.[5] Similarly, Dr. DelBeato [one of Puiatti's two mental health experts] did not testify that Puiatti was under the influence or domination of Glock. Rather, he testified that based upon Puiatti's personality, stress, and brain damage, he "could have been easily influenced." (T10/2296). In fact, Dr. DelBeato testified on cross-examination by the State that I "couldn't say duress or ..." "[substantial domination]" mitigator applied in this case. (T10/2297) Dr. Meadows did briefly mention that based upon Petitioner's personality characteristics, he was under the influence or domination of another person [presumably Glock] at the time of the offense.[6] However, Dr. Mussenden did not relate his conclusion to the particular facts of this case and even a cursory review of Puiatti's joint confession with Glock refutes this theory.[7]

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[5] Dr Mussenden did testify that this was atypical behavior for Glock and that he would probably not have committed the crime unless he was with someone else. (T10/2348-49).

[6] Contrary to Puiatti's argument, the trial court's sentencing order correctly referenced the mental health testimony, noting that Puiatti called Dr. Meadows and Dr. DelBeato while Glock called Dr. Mussenden. (R2/317, Sentencing Record).

[7] The fact that one of Puiatti's experts asserted that Puiatti was under the influence of Glock might support Glock's contention that he was prejudiced by the joint penalty phase, but, does not in any way suggest Puiatti was prejudiced.

However, even if Glock and Puiatti's mitigation theories were antagonistic, this fact alone does not require severance. As noted by the Eleventh Circuit below:

> In *Zafiro*, the Supreme Court explained that "[m]utually antagonistic defenses are not prejudicial per se." [FN19] *Zafiro*, 506 U.S. at 538, 113 S.Ct. at 938; *see Blankenship*, 382 F.3d at 1122 (stating *Zafiro* "specifically rejected the notion that defendants who have contradictory defenses are inherently prejudiced"). And "it is well settled that defendants are not entitled to severance merely because they may have a better chance of acquittal in separate trials." *Zafiro*, 506 U.S. at 540, 113 S.Ct. at 938.
>
> > FN19. In *Zafiro*, the Supreme Court surveyed circuit court decisions and observed that "the courts have reversed relatively few convictions for failure to grant a severance on grounds of mutually antagonistic or irreconcilable defenses." 506 U.S. at 538, 113 S.Ct. at 937.

Puiatti, 626 F.3d at 1310.

Puiatti argues that he was prejudiced by the joint penalty phase in that his two mental health experts faced cross-examination by counsel for co-defendant, Glock.[8] However, the entire cross-examination of Dr. DelBeato by Glock's counsel consisted of the following:

> Q: Dr. DelBeato, is it true that most people are more easily influenced when they're under stress?
>
> A: Yes.
>
> Q: And is it fair to say that whether or not somebody is being influenced or manipulated by another, that only depends on the person, the psychological profile of the person that's being influenced, but also the possibility of a person who's in the position to influence the psychological profile.
>
> A: There would be a relationship.
>
> Q: And you have never examined this man?
>
> A: No.

(T10/2257).

---

[8] Glock's counsel did not cross-examine Puiatti's lay witnesses

Not a single point damaging to Puiatti's case in mitigation can be discerned from the foregoing colloquy The lengthy and damaging cross-examination of Dr. DelBeato came entirely from the State, and, was proper and would have occurred whether Petitioner and Glock were tried together or separately. Similarly, the cross-examination of Dr. Meadows, Petitioner's remaining mental health expert, by Glock's counsel, cannot be described as compelling.

The entire cross-examination of Dr. Meadows by Glock's counsel consisted of the following:

> Q: Dr. Meadows, whether - - is it fair to say that whether or not Mr. Puiatti was under substantial domination of another person at the time of the offense would depend upon the psychological profile of the other person?
>
> A: Without understanding, you know, in detail, I would say it is possible, yes.
>
> Q: Have you ever done any tests or reviewed any records of Robert Glock, II?
>
> A: The confession, um, I have had some sketchy data about his background and temperament from the defendant, from Mr. Puiatti's counselor.

> Q: Okay. But you have not seen any psychological testing, or reports of Mr. Glock, is that correct?
>
> A: That's correct.

(T10/2428). Again, this extremely brief cross-examination by Glock's counsel was not damaging to Petitioner.

Puiatti mentions that the prosecutor linked the two defendants in his penalty phase closing argument. However, this fact does not in any manner support Puiatti's severance claim. Although the prosecutor argued in closing the defendants were like two "peas" in a "pod," Puiatti's counsel also noted similarities between the two defendants. Defense counsel argued: "The family also said that Carl was attracted to misfits and when asked a question by Mr. Cole [prosecutor] whether Carl was perhaps one of those himself, Mrs. Puiatti said she wouldn't deny that he had problems. Nonetheless, misfits, both of them misfits..." (T11/2510). Given the facts of this case, and, the joint confession, the State is hard pressed to envision an argument by the prosecutor which would not link the two defendants. The prosecutor could appropriately make the same argument whether Puiatti and Glock were tried by separate penalty phase juries.

The undisputed record indicates that Puiatti was at the very least, an equal participant in the kidnapping, terrorizing and murder of Mrs. Ritchie.[9] This is not a case where one co-defendant accused the other of being the triggerman during the penalty phase. Yet, even this far more potentially damaging penalty phase scenario did not demand habeas relief in *Rastafari v. Anderson*, 117 F.Supp.2d 788, 806 (N.D. Ind. 2000). In *Rastafari*, the court denied habeas relief for failure to sever the penalty phase and ineffective assistance where each defendant pointed the finger at the other as the triggerman, noting that "there is certainly a quantity of evidence to suggest that the jury's task was made more difficult because the defendants were not severed during the penalty phase, this court is not persuaded that the jury was unable to give individualized attention to each defendant's character, history, and the offense in question."

---

[9] Indeed, the joint penalty phase precluded the prosecutor from shifting more of the blame on Petitioner. Though Glock may have initially suggested they kill the victim, Petitioner agreed, and, turned the car around so that the victim could be murdered. It was Puiatti who was the first to fire shots at and strike the helpless and compliant victim from close range. Puiatti admitted his shots struck the victim in the shoulder and chest. (T9/1996). It was also Puiatti who repeatedly drove the car back to the victim so that he and Glock could ensure her death.

Puiatti's contention that the jury may have held the fact Petitioner chose not to testify during the penalty phase against him[10] simply because Glock chose to testify is speculative and unwarranted given the jury instructions in this case. During the guilt phase the jury was specifically advised by the trial court not to hold the fact the defendant failed to testify against him. Further, this claim of prejudice was not made on direct appeal to the Florida Supreme Court and therefore was not exhausted in state court.

Petitioner's claim that "Puiatti was never able to make any similar statement to the jury[]" referencing Glock's decision to testify, is perplexing. (Cert. Pet. at 5). Puiatti certainly had the option to testify in front of the jury, but, for whatever reason, chose not

---

[10] In the guilt phase the jury was specifically instructed that it could not hold the fact the defendant chose not to testify against him. Courts generally presume the jury follows instructions *Richardson v. Marsh*, 481 U.S. at 207 (noting the "almost invariable assumption" of the law that jurors follow their instructions) There is nothing in this record to overcome that presumption in this case. Courts have generally held that reinstruction on guilt phase instructions such as not testifying is not necessary in the penalty phase as the jury is expected to remember and apply those instructions. See, *People v. Stanley*, 39 Cal.4th 913, 961-962, 140 P 3d 736, 770 (Cal. 2006) (finding no reversible error where the court failed to reinstruct the jury not to draw an adverse inference from defendant's failure to testify in the penalty phase.). *People v Hardy*, 2 Cal 4th 86, 209, 825 P.2d 781, 857 (Cal. 1992) ("Although the trial court failed to reinstruct the jury not to draw any adverse inference from Hardy's silence at the penalty phase, it had no duty to do so.").

to. Puiatti's choice cannot be blamed on his joint penalty phase with Glock.[11]

Puiatti cites no evidence in the record that the jury or trial court impermissibly refused to consider the two defendants as individuals. The trial court's instructions clearly advised the jury that they were to consider each defendant and each sentence separately and render a separate recommendation for each defendant. (T11/2525-27). At no point did the trial court suggest that a single sentence or consistent sentence should be rendered for each defendant. Moreover, Puiatti failed to object to the trial court's instructions or request any special penalty phase instructions on the question of separate sentencing recommendations. Thus, Puiatti's repeated reference to the lack of, or inadequacy of the trial court's instructions in this case is a point which is unpreserved, and unexhausted in state court.

A fact intensive review of the 11th Circuit's decision as requested by Puiatti, would simply not lead to a different result. Despite Puiatti's attempt to conflate a case for prejudice emanating from his joint sentencing with Glock, the facts of this case render a joint penalty phase particularly appropriate. (same charged crimes, same victim and joint confession). This petition does not present an important unsettled issue of law and the underlying

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[11] Nor, can Puiatti blame his joint sentencing on the jury's exposure to Puiatti's criminal history. As noted by the Eleventh Circuit, Puiatti's own witnesses revealed his criminal history. See, e.g., T10/2380-82, 2398. *Puiatti*, 626 F 3d at 1317

decision does not conflict with any of this Court's precedent. Accordingly, the petition for writ of certiorari should be denied.

D. Any Severance Error Would Be Harmless Under *Brecht*

Finally, assuming for a moment that a constitutional error can be discerned on this record, *Brecht v. Abrahamson*, 507 U.S. 619, 113 S. Ct. 1710 (1993) compels denial of the writ in this case. As noted by this Court in *Brecht*, habeas relief is designed to afford relief only to those whom society has "grievously wronged." *Brecht*, 507 U.S. at 637, 113 S. Ct. 1710. The grant of habeas relief must rest upon some compelling factual or legal basis, not simply substitution of a federal court's discretion for that of the state trial court below. See, *Calderon v. Thompson*, 523 U.S. 538, 539, 555-556, 118 S. Ct. 1489, 1493, 1500-01 (1998) (recognizing the "'the profound societal costs that attend the exercise of habeas jurisdiction,'" and the restrictions placed on granting habeas relief to reflect the Court's "enduring respect for 'the State's interest in the finality of convictions that have survived direct review within the state court system.'")(quoting *Smith v. Murray*, 477 U.S. 527, 539 (1986) and *Brecht* at 635)

Not a single aggravating or mitigating factor would be altered or changed under the facts of this case had Petitioner been tried separately from Glock. The same three aggravating factors [CCP, avoid arrest, and prior violent felony] are balanced against the same case in mitigation. Since the underlying

facts of this heavily aggravated case remain unchanged with an 11-1 jury recommendation,[12] it is simply inconceivable that the jury or trial court below would have reached a different decision if only Puiatti's penalty phase had been separated from Glock's. This was a highly aggravated case, involving the kidnapping and cruel murder of a helpless and compliant victim. This was no spontaneous or quick murder from a robbery gone bad, but a cold, and cruel decision to end an innocent and terrified young woman's life. This case is shocking in that it was so cold, and methodical, with the defendants repeatedly returning to ensure the victim's death. A substantial and injurious effect on the penalty phase has not been shown. See, *Calderon v. Coleman*, 525 U.S. 141, 147, 119 S. Ct. 500, 504 (1998) ("The court must find that the error, in the whole context of the particular case, had a substantial and injurious effect or influence on the jury's verdict.").

In conclusion, Petitioner has failed to demonstrate that the Eleventh Circuit's decision is inconsistent with any decision from this Court or any other court of appeals. A fact intensive review of the state trial court's exercise of discretion in this case would have no impact beyond the interests of the parties. See, *Rudolph v. United States*, 370 U.S. 269, 82 S. Ct. 1277 (1962) (recognizing that a certiorari petition predicated on reviewing facts of importance only "to the litigants themselves" was an inappropriate ground to grant a writ).

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[12] Florida is a majority jury vote state on the penalty phase jury recommendation.

CONCLUSION

Based on the foregoing, Respondent respectfully requests that this Court deny the petition for writ of certiorari.

Respectfully submitted,

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(2)

CAPITAL CASE
No. 10-1302

IN THE
Supreme Court of the United States

CARL PUIATTI,
Petitioner,

v.

EDWIN G. BUSS, SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE AND BRIEF *AMICI CURIAE* OF THE CENTER FOR CONSTITUTIONAL RIGHTS AND DR. EDWARD J. BRONSON IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE *AMICI*

Pursuant to Rule 37.2(b) of the Rules of the Supreme Court of the United States, the Center for Constitutional Rights (the "Center") and Dr. Edward J. Bronson, Professor Emeritus, Political Science, Public Law, University of California State, Chico hereby request leave to file the accompanying *amici curiae* brief. This brief is submitted in support of the Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit. Petitioner Carl Puiatti ("Mr. Puiatti") has consented to the filing of this brief. Respondent State of Florida has withheld consent.

Amici are presenting relevant social science research demonstrating that joint capital penalty phase proceedings substantially interfere with the ability of jurors to satisfy constitutional standards for the imposition of the death penalty. This case implicates the Eighth and Fourteenth Amendments to the United States Constitution as they apply to the sentencing of capital defendants. The Eighth and Fourteenth Amendments guarantee capital defendants an individualized determination of sentence so that mitigating evidence can be given full effect and meaningful consideration. In contrast to the Fourth and Fifth Circuits, the Eleventh Circuit wrongly determined below that there were no Eighth Amendment implications "whatsoever" in a joint penalty phase of a capital proceeding and that joint proceedings were "quite compatible" with the constitutional guarantee that defendants in capital cases have individualized sentencing determinations. (Petition for Writ of Certiorari, 63a and 70a).

As set forth in the accompanying brief, the Center is a non-profit legal advocacy organization that is dedicated to advancing and protecting the rights guaranteed by the United States Constitution and the Universal Declaration of Human Rights. Founded in 1966, the Center last term joined an *amici curiae* brief in *Graham v. Florida* and *Sullivan v. Florida* (Eighth Amendment cruel and unusual punishment clause applied to juveniles, who commit non-homicidal crimes, and are sentenced to life without parole) a case in which the Court's majority opinion relied in part on arguments advanced in the Center's *amici* brief.

Accordingly, the Center and Dr. Bronson respectfully requests leave to file the accompanying *amici curiae* brief.

Respectfully submitted,

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CAPITAL CASE
QUESTION PRESENTED

Does a joint capital penalty phase implicate a defendant's Eighth and Fourteenth Amendment rights to an individualized sentencing determination; if so, are those rights violated when a trial court fails to sever a joint capital penalty proceeding despite a likelihood of prejudice and confusion, and never clearly instructs the jury to consider the aggravating and mitigating evidence separately as to each defendant, and to return different sentences if the evidence so warrants.

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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

Amici are the Center for Consitutional Rights ("the Center") and Dr. Edward J. Bronson. The Center is dedicated to advancing and protecting the rights guaranteed by the United States Constitution and the Universal Declaration of Human Rights. Founded in 1966, the Center is a non-profit legal advocacy organization based in New York. The issue before the Court is one of special importance to the rights and protections afforded by the United States Constitution. Joining this brief is Dr. Edward J. Bronson, Professor Emeritus, Political Science, Public Law, University of California State, Chico.[2] *Amici* submits this petition in support of Mr. Puiatti.

This Court's precedents under the Eighth and Fourteenth Amendments establish that a capital defendant is guaranteed an individualized sentencing determination and that sentencing proceedings must allow juries to give "meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty on a

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[1] Pursuant to Rule 37.2(a), *amici* has given notice of intent to file this brief to all parties more than 10 days before this brief was filed. Consent was granted by petitioner and withheld by respondent.

Pursuant to Rule 37 6, *amici curiae* affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

[2] Dr. Bronson obtained his J.D. from the University of Denver, an L L.M from New York University and a Ph.D. in Political Science from the University of Colorado.

particular individual." *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 246 (2007). As the social science research discussed in this brief demonstrates, joint capital penalty proceedings can substantively interfere with jurors' ability to weigh individualized sentencing considerations.

This case provides this Court with the opportunity to ensure courts provide adequate safeguards to secure the right of jointly tried capital defendants to individualized sentencing determinations as guaranteed by the Eighth and Fourteenth Amendments. Empirical data demonstrate that jurors sitting in joint capital penalty proceedings are less likely to consider individualized mitigating evidence, more likely to make collective sentencing decisions about codefendants, and are more likely to sentence defendants to death. This Court should grant this petition to resolve the split among the Circuits and ensure that joint penalty proceedings operate with adequate safeguards so that capital defendants involved in such proceedings receive the individualized sentencing determinations guaranteed by the Constitution.

SUMMARY OF ARGUMENT

Empirical social science research demonstrates joint penalty proceedings impair a capital defendant's constitutionally protected right to an individualized sentencing determination. Research demonstrates with statistical significance that when capital defendants are tried jointly at the penalty phase, jurors are: (i) less likely to consider individually a capital defendant's important mitigating evidence; (ii) more likely to impose the same sentence and

reasoning for jointly tried codefendants; and (iii) more likely to arrive at a death sentence.

The circumstances surrounding Mr. Puiatti's joint penalty phase proceeding demonstrate he was not afforded an individualized consideration of his sentence.

For all of these reasons the Court should grant the petition.

ARGUMENT

I. Research Demonstrates Joint Capital Penalty Phase Proceedings Substantially Interfere With The Ability Of Jurors To Satisfy Constitutional Standards For The Imposition Of The Death Penalty

A. The Law Governing Capital Penalty Phase Proceedings

Capital defendants are entitled to an individualized sentencing determination, one that allows "the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death." *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976) (plurality opinion). In *Woodson* the Court noted that the Constitution requires "consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender." *Id.* at 304. Capital penalty proceedings must be conducted with the "precision that individualized consideration demands." *Stringer v. Black*, 503 US 222, 231 (1992). Such considerations ensure that "each defendant in a capital case [is treated]

with that degree of respect due the uniqueness of the individual." *Lockett v. Ohio*, 438 U.S. 586, 605 (1978).

To ensure that capital defendants receive individualized sentencing determinations, this Court recently held that "sentencing juries must be able to give meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual." *Abdul-Kabir*, 550 U.S. at 246. Mitigating evidence is those "facts about the defendant's character or background, or the circumstances of the particular offense, that may call for a penalty less then death." *Franklin v. Lynaugh*, 487 U.S. 164, 188 (1988) (O'Connor, J., concurring) (citations omitted). Any sentencing process that impairs the jury in giving meaningful consideration to this important information should not pass constitutional muster. *See Abdul-Kabir*, 550 U.S. at 252.[3]

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[3] As petitioner notes, the Fourth and Fifth Circuits have recognized the "inherent tension between joinder and each defendant's constitutional entitlement to an individualized capital sentencing determination," *United States v. Bernard*, 299 F.3d 467, 475 (5th Cir. 2002); *see also United States v. Tipton*, 90 F.3d 861, 892 (4th Cir. 1996). The Eleventh Circuit's decision below incorrectly found that there was no Eighth Amendment implication in a joint capital penalty phase proceeding, but noted *Bernard*'s recognition of potential tension. (Petition for Writ of Certiorari, 63a and 70a)

B. Research Demonstrates A Joint Capital Penalty Phase Can Impermissibly Impair Jurors From Making Individualized Determinations

Research demonstrates that joinder of defendants during capital sentencing substantively impacts the jury's recommendation. Dr. Edward J. Bronson, Professor Emeritus, Political Science, Public Law, University of California State, Chico, conducted extensive studies on the impact of joinder of capital defendants at the penalty phase. In studying jury pool members and students from three California counties, Professor Bronson's studies proved that jurors deciding the penalties for jointly tried capital codefendants are (i) less likely to consider individually a capital defendant's mitigating evidence; (ii) more likely to offer identical sentences based on similar reasoning for each codefendant; and (iii) more likely to arrive at a death sentence. The district court below cited one of Professor Bronson's studies when holding that Mr. Puiatti's joint penalty proceeding denied him his constitutional right to an individualized sentencing determination. (Petition of Writ for Certiorari, 92a-93a, n. 5).[4]

Professor Bronson conducted three studies on joinder of capital defendants employing the same methodology in each of Fresno, Butte, and San Diego counties.[5] Participants in Professor Bronson's studies

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[4] The Eleventh Circuit did not address Professor Bronson's studies.

[5] Edward J. Bronson, *Severance of Co-Defendants in Capital Cases. Some Empirical Evidence*, Cal. St. U , Chico, DISCUSSION PAPER SERIES NO. 94-1 (1994), *also published in* 21 FORUM 52 (1994). The data from all three studies have been described in previous declarations and in testimony. *See, e g* , Decl of

were either on jury pool registries or were local college students eligible to sit as a juror on a capital trial.[6] All participants were "death qualified," *i.e.*, willing to impose either the death sentence or life in prison without parole ("LWOP").

In each study, participants were provided with one of a series of related questionnaires describing a different multiple defendant violent crime scenario. Participants were told that during the guilt phase described in the study, the jury unanimously found all defendants guilty of a violent crime with special circumstances under California law and were instructed to impose either LWOP or the death penalty.[7]

Edward J. Bronson, *United States v. McIntosh*, 2:02-cr-00938-VAP (C.D Cal. Apr. 23, 2007), No. 4906-4.

Almost all data showed statistically significant results, except in two instances mainly due to smaller sample sizes.

In an earlier, preliminary study, Professor Bronson's research demonstrated that when a second defendant was added to penalty considerations, participants drew negative inferences about the first defendant from negative facts about the second defendant. *Id.* (citing Lois Heaney, *Severance Motions: Successful Application of Social Science Evidence*, FORUM 20 (July/August 1988)).

[6] The Fresno study was composed of 295 qualified participants, 193 students and 102 jury pool members. In the Butte study there were 241 qualified participants, 167 students and 74 jury pool members. The San Diego study was composed of 148 qualified participants, all college students from California State University, San Diego, and from California State University, Chico.

[7] The Fresno study described a murder-rape scenario involving three defendants. The Butte study described a murder-robbery-burglary involving three defendants. The San Diego study

Each questionnaire also described the penalty phase and the process for deciding between death and LWOP, and then instructed participants on the meaning of aggravating and mitigating circumstances. The participants were provided a lengthy description of both the aggravating and mitigating evidence for each defendant, including such factors as the brutality of the crime, the role of each defendant in the crime, and prior criminal and social history.

Each study employed "composite" and "severed" questionnaires. Composite, or joint, penalty questionnaires, provided to a subset of participants, included an explanation that, "[t]he judge instructs the jury that it must decide the punishment for each defendant separately and that the defendants need not necessarily receive the same punishment." The subset was then instructed to ascertain a penalty for each defendant. All other participants were provided with a "severed," or separate, questionnaire and were asked to sentence only the one defendant.[8]

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described a murder-robbery-burglary involving two defendants, a father and son.

[8] In total there were four different questionnaires in the studies conducted in Fresno and Butte when accounting for the composite version and a unique severed version for each of the three defendants. Because the San Diego fact pattern involved two defendants that study employed three different questionnaires.

1. Jurors in Joint Capital Penalty Proceedings Are Less Likely to Consider, or They View More Negatively, Mitigating Evidence of Social History

Review of participants' comments demonstrated that jurors in joint penalty proceedings are less likely to consider a defendant's mitigating evidence of social history. Yet, in the capital penalty phase, defense attorneys use social history, which personalizes and humanizes the defendant, as a core defense.[9]

In the Fresno and Butte studies, participants answering the questionnaire where sentences were determined separately, were much more likely to consider the defendant's social history (43.9% v. 22.7%, and 61.9% v. 35.4%, respectively).[10] The data suggest that participants considered defense counsel's social history arguments more heavily in a severed scenario.

Moreover, participants' responses indicated that jurors in joint penalty proceedings considered a capital defendant's social history less favorably to the defendant. Participants who considered social history in the Fresno and Butte studies were more likely to return LWOP when sentencing a

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[9] Presentation of the social history "has become the primary vehicle," with which defense attorneys educate the jury. Craig Haney, *The Social Context of Capital Murder Social Histories and the Logic of Mitigation*, 35 SANTA CLARA L. REV. 547, 559-60 (1995). A jury's failure to consider the affects of social history impairs its ability to provide an individualized sentencing determination.

[10] Professor Bronson did not track participants' responses regarding their consideration of defendant's social history in the San Diego study.

single defendant (40.8% v. 26.5% and 55.0% v. 40.6%, respectively).

If jurors are less likely to consider, or will view more negatively, mitigating evidence of social history during a joint penalty proceeding, their ability to provide an individualized sentencing determination is impaired.

2. Jurors Participating in Joint Penalty Proceedings Are More Likely to Offer Similar Sentencing Rationales

Participants sentenced jointly tried codefendants to the same punishment more often. Analysis of the Fresno severed questionnaires (where sentences were decided separately) indicated that those participants would choose the same verdict, either LWOP or death, for all three defendants in the joined scenario only 27.95% of the time. In contrast, participants answering the questionnaire where sentences were determined jointly, selected the same verdict a remarkable 75.83% of the time.[11] The explanations of participants for their decisions indicated that many viewed defendants collectively.[12]

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[11] In the Butte study participants answering the questionnaire where sentences were determined jointly chose the same sentence for all three defendants 55.38% of the time, but analysis of the severed questionnaires would suggest that they would choose the same verdict only 20 78% of the time.

[12] In the Fresno and Butte studies, in respectively 19 of 72 and 23 of 65 instances, study participants gave very similar or exactly the same comment in supporting their decision for each defendant.

These results suggest jurors make collective judgments when considering jointly tried codefendants and demonstrate that jurors in joint capital penalty proceedings are less likely to achieve the Constitution's guarantee of an individualized sentencing determination.

3. Studies Demonstrate That Jurors Participating In Joint Penalty Proceedings Are More Likely To Rule In Favor Of Death

In all three studies, participants responding to the questionnaire for a joint sentencing were more likely to sentence defendants to death than those participants sentencing defendants in a severed version. (Fresno: 77.8% v. 61.3%; Butte: 65.1% v. 47.2%; San Diego: 58.5% v. 45.5%).

When the data are broken out individually into differentiated penalty verdicts for each hypothetical defendant, the Fresno study produced the following results:

- Defendant 1: 76.4% favored death in a joint phase v. 60.8% favored death in a severed phase;
- Defendant 2: 83.3% favored death in a joint phase v 62.9% favored death in a severed phase; and
- Defendant 3: 73.6% favored death in a joint phase v. 60.8% favored death in a severed phase.

Similarly, in the Butte study:

- Defendant 1: 43.1% favored death in a joint phase v. 31.8% favored death in a severed phase;

- Defendant 2: 80.0% favored death in a joint phase v. 71.7% favored death in a severed phase; and
- Defendant 3: 72.3% favored death in a joint phase v. 42.1% favored death in a severed phase.

Finally, in the San Diego study:

- Defendant 1: 72.3% favored death in a joint phase v. 50.0% favored death in a severed phase; and
- Defendant 2: 44.7% favored death in a joint phase v. 40.8% favored death in a severed phase.

Moreover, all three defendants in the Fresno study were nearly three times more likely to receive death sentences when tried jointly then when tried separately (66.11% v. 23.25%). Participants in the Butte study were four times more likely to issue a death verdict when considering defendants jointly (36.92% compared to 9.60%). The San Diego study defendants were over twice as likely to receive death sentences in joint trials (44.7% v. 20.4%).

II. Mr. Puiatti's Joint Penalty Proceeding Did Not Afford Him An Individualized Sentencing Consideration And Caused Him Prejudice

Research studies support the conclusion that under most circumstances joinder in a capital penalty phase leads to (i) a less favorable consideration of mitigating evidence by jurors; (ii) a less individualized consideration of codefendants' sentences; and (iii) a higher percentage of death sentences. This is what occurred with Mr. Puiatti's penalty proceeding.

A. The Joint Penalty Proceeding Impaired Mr. Puiatti's Ability To Present All Of His Mitigating Evidence For Full And Meaningful Consideration By His Sentencing Jury

This Court has stated that juries must give "meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual." *Abdul-Kabir*, 550 U.S. at 246. Mr. Puiatti's sentencing jury was impaired and unable to provide meaningful consideration of his mitigating evidence.

1. Mr. Puiatti's Counsel Was Unable to Present an Opening Statement to the Penalty Phase Only Because the Proceedings Were Jointly Conducted

The penalty phase proceeding was held on a Saturday morning. Prior to the jurors entering the courtroom, Mr. Puiatti's counsel asked to make an opening statement. The prosecutor did not object, but counsel for Mr. Robert Glock, Mr. Puiatti's codefendant, asked the court to proceed without opening statements. The sentencing court agreed with Mr. Glock's counsel and did not allow any opening statements. (A-10/2216-17). As a result of participating in a joint penalty proceeding, Mr. Puiatti lost a crucial opportunity to frame his critical mitigating evidence through an opening statement, which would have helped humanize Mr. Puiatti and counter the state's aggravating evidence.

2. Mr. Puiatti's Mitigating Evidence Was Impaired When Presented In Conjunction With His Codefendant's Mitigating Evidence

The mitigating evidence that Mr. Puiatti's counsel presented was impaired because it was presented in a joint proceeding. Mr. Puiatti and Mr. Glock offered competing mitigation theories. Mr. Puiatti's expert, Dr. Delbeato, supported the assertion that Mr. Puiatti acted under the substantial domination of another person, a mitigating factor at sentencing under Florida law. Dr. Delbeato testified that Mr. Puiatti was easily influenced and that he would not have committed the offense acting alone (A-10/2244 and A-10/2251). In contrast, Mr. Glock's expert testified that there was a "destructive association" between the defendants and the murder was "atypical behavior" of Mr. Glock that could "only happen if he is with someone else." (A-10/2342 & 2348-49). The testimony of the two experts left the jury with competing "follower" theories, essentially cancelling out each other, leaving only the state's theory of the case to resonate with the jury.

Additionally, because of the joint proceeding, Mr. Puiatti's expert was cross-examined by Mr. Glock's counsel and as a result was subjected to additional "prosecution." The zealous representation by Mr. Glock's counsel impaired Mr. Puiatti's submission of mitigating evidence. Effectively, Mr. Puiatti came under attack by two prosecutors: the state and his codefendant's counsel.

Mr. Puiatti's case was also prejudiced when Mr. Glock chose to testify and expressed his remorse to the sentencing jury. (A-10/2359). Mr. Puiatti, who had prior convictions, exercised his Fifth Amendment

right not to testify to avoid impeachment by his prior convictions. The relative comparison of Mr. Puiatti's silence to the remorse expressed by Mr. Glock may have led the jurors to draw negative inferences from Mr. Puiatti's "refusal" to testify.

As the penalty phase proceeded, each defendant's right to present all mitigating evidence and his constitutional right to be individually considered was undermined as each defendant's mitigating defenses conflicted with those of the other defendant. If the court had severed the proceeding, the mitigating evidence of the two defendants would not have conflicted and been impaired. The jury would have been able to properly evaluate the aggravating and mitigating evidence for each defendant individually.

B. Mr. Puiatti Was Sentenced In A Confusing Joint Penalty Proceeding

The record of Mr. Puiatti's proceedings demonstrates a high likelihood that the jury was confused about its constitutional obligation to arrive at an individualized sentencing determination.

1. The Sentencing Court Was Confused and Misattributed the Codefendants' Characteristics

The state court's language in *Puiatti* demonstrates that even the judge confused the identities of the codefendants. As the district court noted below, the judge actually confused Mr. Glock and Mr. Puiatti in his opinion. (Petition for Writ of Certiorari, 92a & A-2/349). Also, the trial court's sentencing order referred to the codefendants as a pair, equating similarities that did not exist between their backgrounds and upbringings. (Petition for Writ of Certiorari, 91a & A-2/346, A-2/348). Any joint capital penalty

proceeding where the court confuses the identities of the codefendants calls into question whether each defendant received the "degree of respect due the uniqueness of the individual." *Lockett*, 438 U.S. at 605. The fact that even the judge confused the defendants suggests that jurors also were likely confused about the evidence attributable to each defendant.

2. The Jury Was Also Confused

Jurors who sentenced Mr. Puiatti to death were primed to view the defendants jointly rather than as individuals, leading to confusion. The jury was both implicitly and explicitly encouraged to view the codefendants as one unit deserving of a single identical sentence.

a. The Prosecutor's Closing Penalty Phase Argument Encouraged the Jury to View the Defendants As A Single Unit

The prosecutor's penalty phase closing argument confused the jury about the codefendants' individual characteristics, hindering the jury's ability to consider each defendant's aggravating and mitigating evidence separately. The prosecutor referred to the codefendants "as alike as two peas in a pod" and emphasized that Mr. Glock and Mr. Puiatti had a "symbiotic relationship" that in combination enabled the pair to commit the crime. (A-11/2482-83). This argument made it easier for the jurors to apply stereotypes and return the same death sentence for both defendants. The argument impaired the jury's ability to issue an individualized sentencing determination, which impermissibly prejudiced Mr. Puiatti.

In light of the prosecutor's closing argument, the court's confusion and its inadequate instructions, the jury could not adequately satisfy its constitutional obligation to consider each defendant's sentence individually. The identical 11-1 verdicts in favor of death strongly suggest that jurors impermissibly collectively considered the defendants' punishment.

These circumstances are the exact danger that the Eighth and Fourteenth Amendments are intended to protect against. The Constitution prohibits jurors from treating jointly tried codefendants "as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the death penalty." *Woodson*, 428 U.S. at 304. Mr. Puiatti's joint penalty proceeding led to that result.

b. The Trial Court's Instructions Emphasized A Single Punishment And Never Instructed The Jury To Weigh The Mitigating Evidence

Although the Eleventh Circuit below quoted in isolation part of the trial court's instructions, stating that the court had instructed the jury separately about the potential sentences for the defendants, (Petition for Writ of Certiorari, 62a-63a n.29), those instructions could not cure the underlying issue. The trial court never instructed the jury to consider separately each defendant's aggravating and mitigating evidence or return different sentences for the defendants if the evidence warranted. (A-11/2525-2526).

Considering the entire record shows that the sentencing court gave the jurors imprecise and erroneous instructions. The court explained to the jury that it was "now your duty to advise the court as to *what*

punishment should be imposed upon Mr. Glock ***and*** Mr. Puiatti for the crime of murder in the first degree." (A-11/2521) (emphasis added). The court's instructions deindividualized the codefendants, encouraging the jurors to return a single, identical sentence.

III. Courts Must Impose Safeguards to Prevent Joint Defendants In Capital Penalty Phase Proceedings From the Heightened Risk of Losing Their Right To An Individualized Sentencing Determination

The circumstances of Mr. Puiatti's joint penalty proceeding are not unique. As recognized by the Fourth and Fifth Circuits, whenever defendants are joined there is an "inherent tension between joinder and each capital defendant's constitutional entitlement to an individualized sentencing determination." *Bernard*, 299 F.3d at 475; *see also Tipton*, 90 F.3d at 892.

A joined defendant's risk of prejudice will vary with the facts. *Cf. Zafiro v. United States*, 506 U.S. 534, 539 (1993).[13] Joined defendants can be prejudiced in several ways: (i) a defendant's mitigating evidence may be impaired by the presence of his codefendant's mitigating evidence;[14] (ii) one codefendant's evidence

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[13] Although *Zafiro* related to the issue of severance in a jury's determination at the guilt phase, the risks to joint defendants discussed therein are equally applicable to the risks codefendants face in penalty phase proceedings.

[14] *See, e.g., United States v. Catalán-Román*, 376 F. Supp. 2d 96, 106-07 (D.P R. 2005) (severing penalty phase of capital proceedings after recognizing dilution of mitigating evidence)

and theories could prejudice the other codefendant;[15] (iii) a sentencing jury may consider otherwise inadmissible evidence;[16] (iv) codefendants may blame each other;[17] (v) a codefendant's evidence may cause a negative spillover effect encouraging jurors to make negative inferences;[18] and (vi) jury confusion.[19]

The Constitution requires that courts conducting joint penalty proceedings "consider several alternatives to cure any possible prejudice to the defendants {to safeguard} their right to individual sentencing determinations." *United States v. Catalán-Román*, 354 F. Supp. 2d 104, 106 (D.P.R. 2005). Effective

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[15] For example, competing or antagonizing theories of mitigation can cause prejudice. *See Zafiro*, 506 U.S. at 538-39 (recognizing that district courts must fashion relief as the risk of prejudice arises, although mutually antagonistic defenses are not *per se* prejudicial).

[16] This Court has also recognized that "a risk might occur when evidence that the jury should not consider against a defendant and that would not be admissible if a defendant were tried alone is admitted against a codefendant." *Id* at 539. The constitutional right of a defendant is violated if a confessing defendant's statement is used against a non-confessing defendant at their joint trial. *Bruton v. United States*, 391 U.S. 123, 126 (1968).

[17] This results in the defense attorneys acting as additional prosecutors against other defendants as they try to shift blame away from their client. *See, e.g., United States v. Tootick*, 952 F 2d 1078, 1082 (9th Cir. 1991) ("Defendants who accuse each other bring the effect of a second prosecutor into the case with respect to their codefendant.")

[18] With respect to guilt phase proceedings, this Court has already recognized that "evidence of a codefendant's wrongdoing in some circumstances erroneously could lead a jury to conclude that a defendant was guilty." *Zafiro*, 506 U.S. at 539.

[19] *Cf. id.*

safeguards include: (i) curative instructions;[20] (ii) severing the penalty phase proceedings; (iii) holding sequential penalty phase proceedings using one jury; or (iv) empanelling a separate jury for each codefendant but still holding a single proceeding. *See, e.g.*, *Bernard*, 299 F.3d at 476 (court repeatedly instructed jurors to consider each defendant's punishment separately so that it "sufficiently addressed the risk of prejudice resulting from the joint trial"); *Tipton*, 90 F.3d at 892-93 (satisfied with the court's frequent instructions to jurors to consider individually each defendant's case and adding that the government must "be specific" and make individualized arguments); *United States v. McVeigh*, 169 F.R.D. 362 (D. Co. 1996) (severing trials at the guilt phase); *Catalán-Román*, 376 F. Supp. 2d at 107 (severance in the form of sequential penalty hearings); *see also United States v. Henderson*, 442 F. Supp. 2d 159, 162 (S.D.N.Y. 2006) (finding that courts more often order sequential penalty phase proceedings "where one defendant has mitigating evidence of such

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[20] Curative instructions, however, are not always effective because jurors either fail or are unable to follow instructions. James S. Farrin, *Rethinking Criminal Joinder: An Analysis of the Empirical Research and Its Implications for Justice*, 52 LAW & CONTEMP. PROBS. 325, 333-36 (1989) (concluding that "curative instructions, as used by the courts today, are insufficient to counter the prejudicial effects of joinder") *See also, e.g.*, Jonathan D. Casper, et al., *Juror Decision Making, Attitudes, and the Hindsight Bias*, 13 LAW & HUM BEHAV. 291 (1989); Valerie P Hans & Anthony N. Doob, *Section 12 of the Canada Evidence Act and the Deliberation of Simulated Juries*, 18 CRIM L Q. 235 (1976); William C. Thompson, et al., *Death Penalty Attitudes and Conviction Proneness: The Translation of Attitudes into Verdicts*, 8 LAW & HUM. BEHAV. 95, 98 (1984).

force that it places his co-defendant at a unique disadvantage").

None of these safeguards were employed in Mr. Puiatti's case. As a result Mr. Puiatti's sentence was in violation of his Eighth and Fourteenth Amendment right to an individualized sentencing determination. This Court should grant Mr. Puiatti's Petition for Certiorari to redress that constitutional failure.

CONCLUSION

Accordingly, this Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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MAY 25 2011

CAPITAL CASE
No. 10-1302

IN THE
Supreme Court of the United States

CARL PULATTI,
Petitioner,

v.

EDWIN G. BUSS, SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE FLORIDA CAPITAL RESOURCE CENTER IN SUPPORT OF PETITIONER

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IN THE

Supreme Court of the United States

No. 10-1302

CARL PUIATTI,

Petitioner,

v.

EDWIN G. BUSS, SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE

Pursuant to Supreme Court Rule 37.2(b), Florida Capital Resource Center respectfully moves for permission to file the accompanying *amicus curiae* brief. This brief is submitted in support of the Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit. In accordance with Supreme Court Rule 37.2(a), both Petitioner and Respondent have received timely notice of FCRC's intent to file this *amicus* brief. Petitioner Carl Puiatti has consented to the filing of this brief.[1] Respondent State of Florida has not.

[1] Petitioner's letter expressing consent has been filed with the Clerk of Court.

Florida Capital Resource Center ("FCRC") is a non-profit organization whose mission is to protect the constitutional rights of capital defendants in the State of Florida. To that end, FCRC provides free consultation, research, advocacy, and other necessary resources to capital defenders and mitigation specialists statewide to ensure their clients receive the best representation possible. Additionally, FCRC plays a major role in addressing the greater problems within Florida's capital justice system by researching trends and identifying disparities and injustices therein.

As such, FCRC has a direct interest in the resolution of this case because of the disturbingly prejudicial effect the Eleventh Circuit's ruling will have on joint capital proceedings in the State of Florida. Further, FCRC is in a unique position to inform the Court of the far-reaching implications of that ruling, particularly as they relate to Florida's already infirm capital sentencing scheme, a matter of tremendous importance to FRCR.

There are at least 126 joint-capital cases currently pending in Florida that involve 389 codefendants, all of whom benefit from access to FCRC resources.[2] Having an interest in the fair and constitutional administration of criminal justice, Florida Capital Resource Center respectfully requests this Court grant leave to file the accompanying brief as *amicus curiae* on behalf of all of those defendants, who otherwise have no voice in this action, as well as those who come later and find themselves in a joint penalty

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[2] Based on data compiled by Florida's Office of the State Courts Administrator. This number includes capital codefendants facing trial in 59 of Florida's 67 counties.

proceeding facing the ultimate sentence in the State of Florida.

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE* [1]

Florida Capital Resource Center ("FCRC") is a nonprofit organization whose mission is to protect the constitutional rights of capital defendants in the State of Florida and ensure they receive the best possible legal representation by providing extensive legal resources to capital defenders and mitigation specialists who find themselves unduly limited by fiscal and systemic constraints rampant in Florida's capital regime.

To that end, FCRC provides free consultation, research, advocacy, and other necessary resources to capital defenders statewide. Additionally, FCRC plays a major role in addressing the greater problems within Florida's capital justice system by researching trends and identifying disparities and injustices therein. FCRC has a loud voice in Florida's Capitol and advocates for legislative change in the capital justice system consistent with defendants' rights.

Founded in 2009, FCRC now has representatives in all 20 of Florida's judicial circuits, including academics, public defenders, private attorneys, mitigation specialists, a former U.S. Attorney, and President Emeritus of the American Bar Association. FCRC

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[1] Pursuant to Supreme Court Rule 37.2(a), both Petitioner and Respondent have received timely notice of FCRC's intent to file this *amicus* brief. Petitioner Carl Pulatti has consented to the filing of this brief and has lodged a letter of consent with the Clerk of this Court. Respondent Edwin G. Buss, Secretary, Florida Department of Corrections, has withheld consent. Pursuant to rule 37.6, *amicus curiae* affirm that no counsel for any party in this case authored this brief in whole or in part. No person or entity, outside of *amicus curiae*, has made a monetary contribution to the preparation or submission of this brief.

has partnered with several Florida law schools to establish death penalty clinics, and staffs a number of resource attorneys currently involved in several active capital cases.

Florida Capital Resource Center has a direct interest in the questions presented in this case. Although the specific issues presented in the petition address whether the circumstances of Petitioner's sentencing violated his constitutional rights, the substantive questions ultimately at issue in this case – the disturbingly prejudicial effect the Eleventh Circuit's ruling will have on the more than 389 capital codefendants[2] in Florida currently facing joint capital proceedings and the far reaching implications of that ruling within the context of Florida's already infirm capital sentencing scheme – are a matter of tremendous importance to Florida Capital Resource Center.

We agree with the arguments in Petitioner's brief concerning the existing circuit split on whether joint capital proceedings are in tension with the Eighth Amendment. We submit this brief as *Amicus Curiae* to show why the position the Eleventh Circuit assumed on the issue is incompatible with this Court's capital sentencing jurisprudence and how it creates a dangerous precedent for capital defendants facing a joint sentencing proceeding, particularly those in Florida. *Amicus* also draws the Court's attention to the fact that the Eleventh Circuit's rule becomes even more troublesome when applied in the context of Florida's arguably deficient capital sentencing system.

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[2] Based on data compiled by Florida's Office of the State Courts Administrator. This number includes capital codefendants facing trial in 59 of Florida's 67 counties.

There are currently 126 pending joint capital cases in Florida involving 389 codefendants, all of whom benefit from access to FCRC resources. Having an interest in the fair and constitutional administration of criminal justice, Florida Capital Resource Center files this brief as *Amicus Curiae* on behalf of all of those defendants, who otherwise have no voice in this action, as well as those who come later and find themselves in a joint penalty proceeding facing the ultimate sentence in the State of Florida.

SUMMARY OF THE ARGUMENT

This case represents a grave miscarriage of justice in that the petitioner's Eighth and Fourteenth Amendment rights to an individualized determination of sentence was severely compromised and resulted in an unconstitutional sentence of death. Further, *Amicus* recognizes that if this ruling is permitted to stand, a rule of law will have been established that erodes the higher standard of protections necessarily afforded those facing the ultimate sentence, applicable whenever two or more capital defendants proceed together through a joint penalty phase.

Endorsing the Eleventh Circuit's refusal to consider even the possibility that a joint penalty proceeding may have constitutional implications distinct and apart from those in the guilt phase puts a constitutional stamp of approval on a dangerous and deadly rule that far from merits one. Such a rule places these codefendants at a manifest and unfair disadvantage in which, *inter alia*, they are significantly

more likely to receive a sentence of death than those tried in cases in which the penalty phase is severed.[3]

Amicus finds this rule especially offensive as applied in Florida, where the capital justice scheme has already lowered the threshold for receiving a death sentence below that of most other jurisdictions in the United States by permitting a recommendation of death by just seven jurors, a troubling scheme further exacerbated by the ability of the trial judge to override a jury recommendation for a life sentence.

Unless this Court grants review, Petitioner may be executed on the basis of a joint death sentence rendered by a jury that was unable and uninstructed to give meaningful consideration to his individual mitigation case.

I. The Eleventh Circuit Has Established A Dangerous Precedent With Far-Reaching Implications Incompatible With This Court's Capital Sentencing Jurisprudence.

On November 29, 2010, the Eleventh Circuit Court of Appeals considerably curbed defendants' rights when they rendered a decision asserting that Petitioner's severance denial did not violate any constitutional right. *Puiatti v. McNeil*, 626 F.3d 1283, 1318 (11th Cir. 2010). The rule, announced by the Eleventh Circuit in its reliance on the lack of Supreme Court precedent specifically addressing joinder in sentencing determinations, creates an irrebuttable presumption that severance in a penalty phase is

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[3] Edward J. Bronson, *Severance of Co-Defendants in Capital Cases: Some Empirical Evidence*, CAL. ST. U., Chico Discussion Paper Series No. 94-1 (1994).

"improper for codefendants who were properly joined in the guilt phase." *Id.* at 1315.

Though the Eleventh Circuit was accurate in its finding that there is no U.S. Supreme Court precedent on this precise issue, to virtually say that no level of prejudice exists that would require severance, or at a minimum, specific curative instructions to the jury, is inconsistent with interpretations from other circuit courts and is entirely incompatible with this Court's capital sentencing jurisprudence. Significantly, this troubling Eleventh Circuit rule is binding precedent not only in Florida, but also in Alabama and Georgia.[4]

1. As the Eleventh Circuit ruling stands now, not even jury instructions are required to cure any level of prejudice that may occur in a joint capital sentencing proceeding. *See generally Puiatti*, 626 F.3d 1283. According to Judge Hull who delivered the opinion of the court, nothing in a joint penalty proceeding implicates the constitution, distinct and apart from those concerns relevant to severance in joint guilt phase proceedings. *Id.* at 1315. Such a rule is dangerous not only because it fails to acknowledge any constitutional implications whatsoever and neglects to require that curative jury instructions be given in similar circumstances, but also because the implications of the rule are far-reaching and frightening.

Significantly, this decision alerts no prosecutor to the undue prejudice she injects into a joint sentencing proceeding when she groups the defendants

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[4] Florida, Alabama and Georgia together house 22 % of the nation's death row population. Death Penalty Information Center, Facts About the Death Penalty, http://www.deathpenaltyinfo.org/documents/FactSheet.pdf (last visited May 22, 2011).

together in her closing remarks. To understand *Amicus'* apprehension in this regard, one need only envisage what linguistic liberties prosecutors will take throughout the unfettered joint sentencing proceeding the Eleventh Circuit rule contemplates. To be sure, without any explicit direction to the contrary and notwithstanding this Court's unequivocal call for individualized consideration during sentencing, the prosecutor in this case felt uninhibited to repeatedly refer to Petitioner and his codefendant as "two peas in a pod." Pet. Brief at 6.

This ruling identifies no safeguards that can be triggered to combat the confusion that necessarily results when two defendants present their contrariant mitigation cases in a disjointed order within a unified proceeding. Potential confusion of the jury is not so easy to disregard if one imagines a joint sentencing proceeding where not two, but three or four capital codefendants present similar mitigation theories each based upon a characteristic of a codefendant, in a disjointed order. It would be impossible in such a case, as it was for the jury here, to render a decision based upon thoughtful and meaningful consideration to each individual defendant's mitigation theory without admonitory instructions alerting the jurors to guard against their natural inclination to group the codefendants together and render identical sentences for all. Indeed, the Court need only refer to the record in this case, which memorialized the confusion, not only of the jury who recommended death for both defendants by identical 11-1 votes for each, but also of the judge, who himself "could not distinguish the defendants" and "repeatedly confused

one defendant's mitigating evidence for the other."[5] Pet. Brief at 30.

2. As Petitioner notes, other circuits have advanced interpretations of capital sentencing jurisprudence inconsistent with that of the Eleventh Circuit. Those circuits have acknowledged "the inherent tension between joinder and each defendant's constitutional entitlement to an individualized capital sentencing decision." *United States v. Bernard*, 299 F.3d 467, 475 (5th Cir. 2002); and *United States v. Tipton*, 90 F.3d 861 (4th Cir. 1996). Though holding against severance, both circuits based their decision, to a great extent, on the trial judge's administration of frequent and curative jury instructions "which sufficed to reduce the risk [of unfairness and prejudice] to acceptable levels." *Tipton*, 90 F.3d at 892; *Bernard*, 299 F.3d at 476.

Tellingly, some state supreme courts have spoken on this issue, including Kentucky, who, while affirming joinder of two capital codefendants in the guilt phase, mandated severance in the sentencing phase. *Foster v. Commonwealth*, 827 S.W.2d 670 (Ky. 1992) (holding that the respective mitigation evidence offered by the codefendants was antagonistic to each other and that the joint penalty phase was "unfairly tainted by the appearance of [the codefendant's] counsel acting as a second prosecutor" to the appellant). Even Florida Supreme Court Justice Rosemary Barkett recognized capital defendants' entitlement

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[5] In this case, both judge and jury were confused, *inter alia* because of the similarity between codefendants' mitigation theories. *See* Pet. Brief at 28 ("But it is their very similarity that made the two theories mutually exclusive. Each blamed the other as the instigator of the crime and each claimed he would not have done it but for the other.").

to individualized sentencing under the Constitution. *Puiatti v. Dugger*, 589 So. 2d 231 (Fla. 1991); and *Espinosa v. State*, No. 73,436, slip op. at 17-18, 1991 WL 123077 (Fla. July 11, 1991) (Barkett, J., dissenting) (asserting that where defendants present antagonistic defenses, severance should always be the rule in the penalty phase of a capital case).

Others states, have codified a high standard for upholding defendants' constitutional rights by removing severance decisions in capital cases entirely from the discretion of the trial judge. *See* GA. CODE ANN. § 17-8-4(a) (granting severance as of right to any capital defendant so electing); MO. REV. STAT. § 545.880 (2010) (granting automatic severance upon motion of a capital defendant *inter alia* where only one codefendant has a criminal history); and OHIO REV. CODE ANN. § 2945.20 (2011) (making severance mandatory for capital defendants jointly indicted and allowing joinder only upon good cause shown).

3. Additionally, this Court, without speaking directly on the issue, has articulated significant legal analyses under which the Eleventh Circuit ruling cannot endure. While, as the Eleventh Circuit acknowledges, this Court has never held that the special concerns in capital cases require severance in sentencing determinations, *Puiatti*, 626 F.3d at 1315, it has consistently recognized the constitutional "need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual." *Lockett v. Ohio*, 438 U.S. 586, 602 (1978).

The principal of individualized consideration in capital sentencing is the cornerstone of this Court's death penalty jurisprudence. *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (Stewart, J.) (attesting mandate of *Furman v. Georgia*, 408 U.S. 238 (1972), that

"where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited . . ."). As articulated by Justice Stewart in *Woodson v. North Carolina*, U.S. 280, 304 (1976), we require a heightened degree of reliability "that death is the appropriate punishment," because death is unique in its finality. 428. In *Lockett*, this Court extended the constitutional imperative of directed discretion in capital sentencing to require not only that a capital defendant have an opportunity to present any mitigating evidence that could increase the chance, however slight, of a sentence less than death, but also that a sentencer be unrestricted in the ability to receive and meaningfully consider such evidence. 438 U.S. at 604.

In *Lockett*, according meaningful consideration and effect to the individual during sentencing meant striking down an Ohio statute that did not allow for a sentencing judge to consider mitigating evidence not specifically delineated in the statute. *Id.* In *Eddings v. Oklahoma*, 455 U.S. 104 (1982) it meant prohibiting Oklahoma courts from refusing to consider mitigating evidence as a matter of law. In *Abdul-Kabir v. Quarterman*, 550 U.S. 233 (2007) it meant requiring an instruction be given a Texas jury that allowed it to consider mitigating evidence beyond the scope of statutory special questions that mandated death when answers to both questions were in the affirmative. Here, in Petitioner's case, at the apex of defendants' constitutional rights it means granting severance of the codefendants at the penalty phase, but at a minimum, it means directing the jury through curative instructions to consider the aggravating and mitigating factors presented by each

defendant only with respect to that individual defendant's sentence.

Today, this Court has an opportunity to carry on "the law's effort to develop a system of capital punishment at once consistent and principled but also humane and sensible to the uniqueness of the individual." *Eddings* at 874. The jarringly discordant rule descanted by the Eleventh Circuit must be released and recued in tune with the chorus of constitutional justice. Indeed, only this Court has the power to do so, through the grant of writ of certiorari.

II. Florida's Capital Sentencing Scheme Creates A Lower Threshold For Death Sentences And Cannot Constitutionally Sustain the Eleventh Circuit's Rule.

As stated above, the Eleventh Circuit's holding creates a dangerous precedent. While this Court should grant certiorari to synchronize application of the Eighth and Fourteenth Amendments to capital sentencing proceedings amongst the federal circuits and to prevent this prejudice-compounding rule from spreading to other circuits, it is important this Court appreciate the impact this rule will have on codefendants in the context of Florida's capital justice scheme.[6] Denial of certiorari in this case would leave

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[6] In discussing Florida, it is worth noting at the outset that the constitutionality of Florida's capital justice scheme has been seriously called into question after this Court's ruling in *Ring v. Arizona*, 536 U.S. 584 (2002). In *Ring*, this Court took issue with Arizona's capital sentencing scheme because it required "a sentencing judge, sitting without a jury, to find [the presence or absence of] an aggravating circumstance necessary for imposition of the death penalty." 536 U.S. at 609. This Court held that "[i]f a State makes an increase in a defendant's authorized

punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt," 536 U.S. at 602 (quoting *Apprendi v. New Jersey*, 530 U.S. 466 (2000)), effectively extending *Apprendi* to both noncapital *and* capital cases. Speaking for the majority, Justice Ginsberg reasoned "[t]he right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death." *Id.* at 609.

The majority opinion declined to comment on the effect its ruling would have on Florida's capital justice scheme, but as then Florida Supreme Court Chief Justice Anstead pointed out in his concurring opinion in *Bottoson v. Moore*, 833 So.2d 693 (Fla. 2002) (per curiam), it cannot be overlooked that this Court had already observed that Florida's scheme contained the same infirmity that would make it Arizona's "functional equivalent:"

> The distinctions Walton attempts to draw between the Florida and Arizona statutory schemes are not persuasive. It is true that in Florida the jury recommends a sentence, but it does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge. A Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona.

Walton v. Arizona, 497 U.S. 639, 648 (1990). Indeed, the fact-finding role of Florida's judge in capital sentencing was not lost on Justice O'Connor. *See Ring*, 536 U.S. at 621 (O'Connor, J., dissenting) (expressing concern that the fact-finding role of Florida's judges in capital sentencing is now subject to challenge under *Ring*) After reviewing Florida's capital sentencing scheme in light of these rulings, *Amicus* cannot help but conclude that it is constitutionally deficient. And while the Florida Supreme Court has declined to strike down the statute until this Court speaks directly to Florida, at the time *Ring* was decided, a majority of the justices seemingly agreed. *See Bottoson*, 833 So.2d 693 (2002) (per curiam), (Anstead, C.J., concurring) (relying heavily on Justice Scalia's interpretation of the Sixth

open the iron gates of due process that safeguard capital codefendants' right to individualized sentencing, allowing prejudice to penetrate joint-penalty proceedings with little judicial restraint.

Several aspects of Florida's statutory capital sentencing scheme act to lower the threshold for receiving a death sentence below that of perhaps any other jurisdiction, making Florida a uniquely dangerous place for capital defendants to stand trial. Installation of the Eleventh Circuit's rule from Petitioner's case as a permanent fixture will only serve to exacerbate these conditions at great cost to codefendants' rights.

First, unlike any other state, Florida requires only a *bare majority* of the jury to recommend a death sentence. See Fla. Stat. §921.141 (2010). Second, Florida's scheme includes a "jury override" provision that permits judges to impose a sentence that is contrary to any jury recommendation. *See id.* Finally, any sentence arrived at by the jury is only "advisory," instead relying on the judge to enforce the jury's decision. *See id.*

Aside from the constitutional implications of each individual component of Florida's capital sentencing scheme, the lower threshold for death sentences they collectively create has contributed to Florida housing the second-highest death row population in the country.[7] As shown below, empirical evidence suggests

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Amendment as written in his concurring opinion in *Ring*), (Shaw, Pariente, & Lewis, J.J., concurring).

[7] Florida currently has 397 people on death row. *See* Florida Department of Corrections, Death Row Roster, http://www.dc.state.fl.us/activeinmates/deathrowroster.asp (last visited May 22, 2011). At 704, California has the most. *See* Death Penalty

that this scheme has a detrimental effect on the reliability of Florida jurors, further compromising a defendant's right to an individualized sentencing determination. *See* William J. Bowers *et al.*, *The Decision Maker Matters: An Empirical Examination of the Way the Role of the Judge and the Jury Influence Death Penalty Decision-Making*, 63 WASH. & LEE L. REV. 931 (2006). Because research demonstrates that juries are significantly more prone to recommend death in joint penalty proceedings,[8] *Amicus* submits that the Eleventh Circuit's rule is simply too much for Florida's codefendants to bear.

As a preliminary matter, Amicus acknowledges that the constitutionality of Florida's overall capital sentencing scheme is not an issue before this Court. However, *Amicus* raises constitutional concerns regarding specific aspects of that system to help this Court recognize that when the Eleventh Circuit's rule is applied in Florida, the scales of justice are tipped intolerably away from defendant rights and toward prejudicial and unconstitutional prosecution.

1. First, Florida is the only jurisdiction in the United States in which just seven jurors can recommend the ultimate sentence. *State v. Steele*, 921 So.2d 538, 550 (2005). In fact, of the 34 states that still retain the death penalty,[9] Florida and Alabama are the only two jurisdictions remaining in which the

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Information Center, State by State Database, http://www.deathpenaltyinfo.org/state_by_state (last visited May 22, 2011). Alabama comes in third with 204 death row inmates. *See id.* Like Florida, juries in Alabama also provide advisory sentences. *See* Ala. Code §13A-5-46 (2010).

[8] *See* Bronson, *supra*, note 3.

[9] *See* Facts About the Death Penalty, *supra*, note 4.

jury's recommendation can be anything less than unanimous,[10] though even Alabama refuses to allow a death recommendation by less than ten jurors. *See* Ala. Code § 13A-5-46(f). Whether this indicates Florida and Alabama are unconstitutionally resistant to a "national consensus" reflecting the "evolving standards of decency that mark the progress of a maturing society" is not before the Court. *Graham v. Florida*, 130 S.Ct. 2011, 2021 (2010) (citing *Estelle v. Gamble*, 429 U.S. 97 (1976)). What is of concern, however, is that allowing for such a small number of jurors to impose such a large sentence has serious implications on a defendant's rights.

An advisory sentence of death should be a reflection of a jury's reasoned, moral response to the defendant's background, character and crime. *California v. Brown*, 479 U.S. 538, 545 (1987). One might expect such a powerful determination to only result from meaningful, time-consuming deliberation. However, empirical evidence shows that Florida jurors are making this determination faster than anywhere else, and for a simple reason: the deliberations end with just seven votes. *See* Fla. Stat. § 921.141 (2010).

In Bowers, *supra*, researchers from the Capital Jury Project used data collected from actual capital jurors across fourteen states to compare the reliability of jurors in "binding" states (those where the jury's determination of sentence is binding on the judge) with those in "hybrid" states (those where jurors recommend an advisory sentence but the judge makes the final sentencing determination). Bowers,

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[10] BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ212351, STATE COURT ORGANIZATION, 251-53 (2004), *available at* http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=1204.

supra, at 950-52.[11] When researchers examined the differences in time spent deliberating between these two types of jurors, they discovered that jurors in hybrid states like Florida "decided on punishment much more quickly" than those in binding states, reporting that hybrid jurors are "more likely to decide [whether to render a death sentence] *in an hour or less* and less likely to take three or more hours to decide." *Id.* at 974-75 (emphasis added). The report further found that the number of jurors "required for reaching a death verdict seems to be what accounts for the sizable hybrid-binding difference in deliberations lasting longer than three hours;" jurors from Alabama and Florida, the only two states that do not require a unanimous jury, reported far lower deliberation times than all other "unanimous states." *Id.* Significantly, however, between those two states, even Alabama jurors reported deliberating for three or more hours twice as often as Florida jurors, demonstrating just how detrimental an effect Florida's majority rule has on jury deliberations. *Id.*

This shorter deliberation period has obvious implications on a defendant's right to a meaningful, individualized sentencing determination; if Florida jurors are deliberating for such short amounts of time, it follows that they are very likely giving a defendant's individual circumstances much less consideration.

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[11] The Capital Jury Project is a national program of research on the decision-making of capital jurors conducted by a consortium of university-based researchers with the support of the National Science Foundation." Bowers, *supra*, at 950. States in which jurors were interviewed for this study included Alabama, California, Florida, Georgia, Indiana, Kentucky, Louisiana, Missouri, North Carolina, Pennsylvania, South Carolina, Tennessee, Texas, and Virginia. *Id.*

See Penry v. Lynaugh, 492 U.S. 302, 319 (1989) ("*Eddings* makes clear that it is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and give effect to that evidence in imposing sentence."). Indeed, Bowers reports that Florida jurors asked to review testimony or transcripts during deliberations much less frequently than any other state surveyed.[12] Bowers, *supra*, at 976-77. Finally, after suggesting that the "number of votes the jury takes to reach its punishment may reflect the degree to which jurors challenge and contest the views of their peers," or perhaps "the kind of healthy disagreement that forces jurors to soberly review and rethink their assumptions and conclusions," Bowers notes that Florida jurors decided their sentence after just one vote far more often than those of any other state. *Id.* at 975-76.

Thus, Florida's majority rule stifles meaningful deliberation for the simple reason that finding agreement between seven people is faster and easier than finding it amongst twelve. There is no reason to expect these findings would be any different if the case involved codefendants. In fact, the tendency of Florida's jurors to rush through deliberations without adequately considering the evidence before them might lead to the "lumping" effect noted in Bronson, *supra*, at 4-5, in which jurors "lump" codefendants

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[12] Bowers further reports that the narrative "accounts of many jurors in hybrid states indicate that they did not devote much time, energy, or emotional commitment to the punishment decision," citing one Florida juror who remarked "I firmly believe that within 2 minutes of walking into the jury room everybody there knew exactly the way he was going to vote." Bowers, *supra*, at 979.

together based on faulty assumptions about common attributes.[13] Indeed, both defendants in Petitioner's case were sentenced to death by the same majority (11-1) of a jury that delivered their advisory sentence in "about an hour."[14] *Puiatti v. McNeil*, 626 F.3d at 1300. While *Amicus* cannot speak to what occurred in the jury room during the deliberations in Petitioner's case, *Amicus* does submit that given the prejudicial nature of his penalty phase and the empirical evidence discussed above, judges conducting Florida's capital sentencing proceedings must be all the more admonitory in jury instructions. It follows that providing *no instructions* to the jury (as in Petitioner's case), particularly in a joint-penalty proceeding, most often will pose significant risks of contravening defendant's right to an individualized sentencing determination.

2. Second, Florida's statute allows judges to override an advisory jury sentence. *See* Fla. Stat. §921.141(3) ("Notwithstanding the recommendation of a majority of the jury, the court . . . shall enter a sentence of life imprisonment or death . . . ."). In fact, "[b]etween 1972 and early 2011, a total of 166 death sentences were imposed in Florida following a jury

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[13] While no research on the lumping effect within Florida's capital justice system currently exists, there is evidence supporting this proposition in the Federal system. *See* KEVIN MCNALLY, DECLARATION OF KEVIN MCNALLY REGARDING JOINT AND SEPARATE TRIALS AND OUTCOMES IN MULTIPLE CAPITAL DEFENDANT FEDERAL DEATH PENALTY TRIALS, Doc. 1050-1 (filed 7/24/2009) (reporting that while "district courts have granted separate trials or separate penalty hearings in a clear majority of cases," "in those trials involving more than one capital defendants, juries have reached the same verdict on punishment – either life or death – for all defendants in nearly every case.").

[14] Deliberation time confirmed by Petitioner's trial counsel, Howardene G. Garrett, in phone call on May 25, 2011.

recommendation of life imprisonment." Michael L. Radelet, *Overriding Jury Sentencing Recommendations in Florida Capital Cases: An Update and Possible Half-Requiem*, MICH. ST. L. REV. (forthcoming 2011). Despite the limitations placed on use of the jury override to impose a death sentence following an advisory life sentence in *Tedder v. State*, 322 So.2d 908 (Fla. 1975) (holding "[i]n order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ."), 35 of such overrides have been upheld on direct appeal since the *Tedder* Standard was first handed down. *See* Radelet, *supra*.

The constitutionality of such a statutory mechanism is certainly questionable,[15] especially since this Court's ruling in *Ring v. Arizona*. 536 U.S. 584. As Justice Lewis of the Florida Supreme Court noted in *Bottoson*, the decision in *Spaziano v. Florida*, 468 U.S. 447 (1984) (holding Florida's judicial override provision constitutional), "was premised upon an unstated presumption that jury involvement is not required in the sentencing proceedings of capital cases." 833 So.2d at 727 (Lewis, J., concurring). Addressing the conflict created by *Ring*, he concluded that if "*Apprendi* and *Ring* support the proposition that it is unconstitutional for a trial judge to independently find fact with regard to aggravators and impose a sentence of death without jury involvement,

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[15] American Bar Association, *Florida Death Penalty Assessment Report*, Executive Summary of the Florida Death Penalty Report at vii, x (Sept 2006) (questioning whether the judicial override survives this Court's ruling in *Ring v. Arizona* and recommending Florida eliminate the practice and "give the jury final decision-making authority in capital sentencing proceedings").

surely the Supreme Court's *Spaziano* decision . . . cannot now stand." *Id.*

Constitutionality aside, the jury override provision is still Florida law, and though it explicitly provides a "backdoor" through which judges can impose death sentences, its very existence further lowers the threshold of receiving one because of its collateral effects on Florida jurors. In Bowers, *supra*, at 948, researchers examined the effect the judicial override has on jurors' perceptions with respect to their responsibility as sentencers. Bowers found that "jurors in hybrid states were especially unlikely to see themselves as responsible for the defendant's punishment, [as nearly] all jurors in the three hybrid states understood that the judge did not have to accept their punishment decision." *Id.* at 954. Further, mere knowledge of the override causes jurors to feel less vested in their decision. *Id.* at 963. Consequently, these jurors "are more likely to deny responsibility, invest less energy in understanding instructions, and more often rush to judgment," three ingredients when mixed with Florida's majority verdict rule produce faster, less meaningful deliberation. *Id.* at 975; *see Penry*, 492 U.S. at 319.

Finally, Bowers' research also suggests that the jury override may produce uninformed jurors because while those in hybrid states like Florida often had trouble identifying whether they were limited to consideration of statutory mitigating and aggravating factors, nearly all understood that the judge could override their advisory sentence, indicating that jurors fixate on that portion of the jury instructions. Bowers, *supra*, at 966-69. Thus, the jury override rule poses a significant threat to individualized sentencing determinations as it produces disinterested

and uninformed juries charged with rendering advisory sentences of life or death. It would seem, then, reminding juries of their duty to provide individualized sentencing determinations when faced with co-defendants should be standard practice; yet in Petitioners case, the Eleventh Circuit held such instructions were not even necessary when the proceedings were wrought with prejudice, an unnecessarily harsh rule, especially in the context of Florida's capital sentencing scheme.

3. Finally, the advisory role of Florida's capital juries has a prejudicial effect on defendants rights stemming from the reallocation of fact-finding that resonates throughout the entire capital system. It is perhaps here where the constitutional implications of *Ring* are heard loudest:

> [T]he fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives – whether the statute calls them elements of the offense, sentencing factors, or Mary Jane – must be found by the jury beyond a reasonable doubt.

Ring, 536 U.S. 584 (Scalia, J., concurring). Despite that edict, pursuant to Florida's capital sentencing statute, the "aggravating circumstances" required to impose a death sentence are only *found* by the trial judge: "If the court imposes a sentence of death, it shall set forth in writing *its findings* upon which the sentence of death is based as to the *facts* (a) *that sufficient aggravating circumstances exist* . . . ." Fla. Stat. § 921.141(3). Further, while the jury renders an advisory sentence as to their existence, those "advisory findings" are never specified to the court. *See* Fla. Stat. §921.141(2). Thus, even if the jury

"advises" their existence, any aggravating circumstances found by the judge will not necessarily be the same as those "advised" by the jury. Though held constitutional in *Hildwin v. Florida*, 490 U.S. 638 (1989), this scheme is now suspect at best under *Ring*, which would likely consider Florida's aggravating circumstances to be the functional equivalent of elements of a crime. *See Apprendi*, 530 U.S. 466.

Notwithstanding its questionable constitutionality, that is the law followed in Florida, and it presents three prejudicial problems for capital defendants: (1) The judge has usurped the fact-finding duty of the jury, effectively eliminating the benefit of discourse amongst deliberating jurors; (2) the jurors are aware that the judge makes the final determination, causing them to deliberate less in rendering their advisory opinion; and (3) the advisory sentence cripples any chance at meaningful review because the jury's "findings" are neither written nor orally specified for the record.

In *Caldwell v. Mississippi*, 472 U.S. 320, 328-29 (1985), this Court held that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." Despite *Caldwell's* edict, Bowers found that "hybrid statutes undermine jurors' sense of the jury's responsibility." Bowers, *supra*, at 959. This reduced sense of responsibility "carries the further ominous implication that jurors under hybrid statutes are apt to be less conscientious in making the awesome moral judgment at the heart of capital sentencing." *Id.* at 960. Perhaps this is to be expected when the finders of fact are no longer charged with *finding* facts.

In *Bottoson*, Chief Justice Anstead makes particular note of the potential problems associated with judicial fact-finding. 833 So.2d at 706-08 (concurring). Because the advisory jury makes no findings of fact, the facts contained in the record are facts that were found – and written – by the trial judge. *See* Fla. Stat. §921.141 (2010). It is these same facts on which the judge imposes his sentence, and it is these same facts that are mandatorily reviewed by the Florida Supreme Court. *Id.* On appeal, the record will only contain those same, judicially found facts. Thus, pursuant to Florida statute, not only does the trial judge usurp the fact-finding duty from the jury in a capital penalty phase, but it is the judge's facts on which a capital defendant is forced to base his appeal. *Bottoson*, 833 So.2d at 706-08.

Such a penalty scheme clearly demonstrates the importance of this Court's decision in *Ring*, 536 U.S. 584: "Entrusting to a judge the finding of facts necessary to support a death sentence might be 'an admirably fair and efficient scheme of criminal justice designed for a society that is prepared to leave criminal justice to the State,'" but neither *Amicus* nor Petitioner are prepared to live in such a society. *Ring*, 536 U.S. at 607 (citing *Apprendi*, 530 U.S. at 498 (Scalia, J., concurring). Petitioner was subjected to an unfairly prejudicial joint-penalty proceeding that infringed upon his right to individualized consideration, and the Eleventh Circuit determined that such a proceeding does not even warrant a jury instruction. Such a rule imposes too high a risk upon the rights of codefendants facing "the most irrevocable of sanctions," especially here in Florida. *Gregg*, 428 U.S. at 182.

CONCLUSION

Amicus has shown the far-reaching and dangerously prejudicial implications of the Eleventh Circuit's holding, particularly as contextualized within the State of Florida. Accordingly, *Amicus* respectfully requests this Court grant a writ of certiorari to the Eleventh Circuit.

Respectfully submitted,

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